Google

This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at http://books.google.com/

HARVARD LAW LIBRARY

Received JUN 7 1922

REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF MONTANA

FROM MAY 6, 1921, TO OCTOBER 3, 1921

OFFICIAL REPORT

VOLUME 60

SAN FRANCISCO
BANCROFT-WHITNEY COMPANY
1922

COPYRIGHT, 1922

BY

BANCROFT-WHITNEY COMPANY

JUN 7 1922

SAN FRANCISCO
THE FILMER BROTHERS ELECTROTYPE COMPANY
TYPOGRAPHERS AND STEREOTYPERS

JUSTICES

OF

THE SUPREME COURT OF THE STATE OF MONTANA,

DURING THE TIME OF THESE REPORTS.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. FRANK B. REYNOLDS,
THE HON. CHARLES H. COOPER,
THE HON. WILLIAM L. HOLLOWAY,
THE HON. ALBERT J. GALEN,
} Associate Justices.

SUPREME COURT COMMISSIONERS:

HON. WM. H. POORMAN, Chief Commissioner,
(Judge of the First Judicial District).

HON. A. C. SPENCER, Commissioner,
(Judge of the Thirteenth Judicial District).

HON. JOSEPH R. JACKSON, Commissioner,
(Judge of the Second Judicial District).

OFFICERS OF THE COURT:

WELLINGTON D. RANKIN, Attorney General.

LEROY A. FOOT,
GAEL G. WILSON,
ALBERT H. ANGSTMAN,
CHARLES P. COTTER,
} Asst. Attorneys General.

JAMES T. CARROLL, Clerk.

M. N. RACE, Marshal.

A. C. SCHNEIDER, Court Stenographer.

ATTORNEYS AND COUNSELORS AT LAW.

Admitted from June 27, 1921, to March 20, 1922.

BENNETT, HARRY P., Admitted December 12, 1921.

BLAIR, FRANK E., Admitted December 12, 1921.

CALHOUN, BERNARD P., Admitted March 20, 1922.

COLVIN, HOWARD M., Admitted February 6, 1922.

FOOT, EUGENE B., Admitted September 19, 1921.

FREEMAN, J. P., Admitted October 3, 1921.

GAULT, JOHN McP., Admitted October 10, 1921.

IVINS, THOS. O. H., Admitted February 6, 1922.

KELLY, FRANCIS P., Admitted December 12, 1921.

NEYMAN, FANNEY, Admitted December 12, 1921.

SHEPARD, GEORGE R., Admitted November 11, 1921.

TIGHE, STEPHEN B., Admitted December 12, 1921.

WAGNER, JAMES G., Admitted December 12, 1921.

WALLACE, P. J., Admitted December 27, 1921.

WELD, LYMAN P., Admitted March 20, 1922.

DIRECTORY

OF THE

JUDICIAL DISTRICTS OF THE STATE OF MONTANA

1922.

First Judicial District.

County of Lewis and Clark. County Seat, Helena.

District Judges: Hon. W. H. Poorman; Hon. A. J. Horsky.

Officers: County Attorney: Jos. R. Wine, Esq.
Clerk of District Court: Will Whalen.
Sheriff: Thomas H. Spratt.

Second Judicial District.

County of Silver Bow. County Seat, Butte.

District Judges: Hon J. J. Lynch; Hon. Wm. E. Carroll;
Hon. Joseph R. Jackson.

Officers: County Attorney: Geo. Bourquin, Esq.
Clerk of District Court: J. F. Driscoll.
Sheriff: Larry Duggan.

Third Judicial District.

Counties of Deer Lodge, Powell and Granite.

District Judge: Hon. George B. Winston.

Officers of Deer Lodge County (County Seat, Anaconda):
County Attorney: J. B. C. Knight, Esq.
Clerk of District Court: E. B. Heagy.
Sheriff: C. L. Beall.

Officers of Granite County (County Seat, Philipsburg):
County Attorney: Wingfield L. Brown, Esq.
Clerk of District Court: Wm. B. Calhoun.
Sheriff: Fred. C. Burks.

Officers of Powell County (County Seat, Deer Lodge):
County Attorney: E. J. Cummins, Esq.
Clerk of District Court: R. Lee Kelley.
Sheriff: J. E. Neville.

FOURTH JUDICIAL DISTRICT.

Counties of Mineral, Missoula, Ravalli and Sanders.

District Judges: Hon. A. L. Duncan; Hon. James M. Self; Hon. Theodore Lentz.

Officers of Mineral County (County Seat, Superior):
County Attorney: W. L. Hyde, Esq.
Clerk of District Court: Harold B. Ives.
Sheriff: Wm. La Combe.

Officers of Missoula County (County Seat, Missoula):
County Attorney: John L. Campbell, Esq.
Clerk of District Court: Harry M. Rawn.
Sheriff: Wm. H. Houston.

Officers of Ravalli County (County Seat, Hamilton):
County Attorney: J. D. Taylor, Esq.
Clerk of District Court: J. Q. Adams.
Sheriff: Clarence E. Hogue.

Officers of Sanders County (County Seat, Thompson Falls):
County Attorney: Adelbert A. Alvord, Esq.
Clerk of District Court: L. E. Smith.
Sheriff: Joseph L. Hartman.

FIFTH JUDICIAL DISTRICT.

Counties of Beaverhead, Jefferson and Madison.

District Judges: Hon. Joseph C. Smith; Hon. Lyman Bennett.

Officers of Beaverhead County (County Seat, Dillon):

County Attorney: Thos. E. Gilbert, Esq.
Clerk of District Court: Wm. E. Stephenson.
Sheriff: Daniel F. Mooney.

Officers of Jefferson County (County Seat, Boulder):

County Attorney: J. E. Kelly, Esq.
Clerk of District Court: Jas. S. Flaherty.
Sheriff: T. L. Locker.

Officers of Madison County (County Seat, Virginia City):

County Attorney: Edgar P. Reid, Esq.
Clerk of District Court: Matt Carey.
Sheriff: Clarence W. Hungerford.

SIXTH JUDICIAL DISTRICT.

Counties of Park, Stillwater and Sweet Grass.

District Judge: Hon. Albert P. Stark.

Officers of Park County (County Seat, Livingston):

County Attorney: Elbert F. Allen, Esq.
Clerk of District Court: H. J. Reese.
Sheriff: James McClarty.

Officers of Stillwater County (County Seat, Columbus):

County Attorney: M. L. Parcells, Esq.
Clerk of District Court: G. B. Iverson.
Sheriff: Edward B. Fellows.

Officers of Sweet Grass County (County Seat, Big Timber):

County Attorney: Horace S. Davis, Esq.
Clerk of District Court: J. E. Rees.
Sheriff: G. B. Long.

SEVENTH JUDICIAL DISTRICT.

Counties of Dawson, McCone, Richland and Wibaux.

District Judge: Hon. Frank P. Leiper.

Officers of Dawson County (County Seat, Glendive):

County Attorney: F. S. P. Foss, Esq.
Clerk of District Court: Frank A. Parrett.
Sheriff: A. H. Helland.

Officers of McCone County (County Seat, Circle):

County Attorney: Homer A. Hoover, Esq.
Clerk of District Court: C. F. Campbell.
Sheriff: Floyd Davis.

Officers of Richland County (County Seat, Sidney):

County Attorney: L. V. Ketter, Esq.
Clerk of District Court: Guy L. Rood.
Sheriff: Fred. D. Sullivan.

Officers of Wibaux County (County Seat, Wibaux):

County Attorney: Elmer W. Cowee, Esq.
Clerk of District Court: C. L. Deringer.
Sheriff: A. Barclay.

EIGHTH JUDICIAL DISTRICT.

County of Cascade.

District Judges: Hon. Jere B. Leslie; Hon. Harry H. Ewing.

Officers of Cascade County (County Seat, Great Falls):

County Attorney: Howard G. Bennet, Esq.
Clerk of District Court: Alex. Remneas.
Sheriff: Bob Gordon.

NINTH JUDICIAL DISTRICT.

County of Gallatin. County Seat, Bozeman.

District Judge: Hon. Ben. B. Law.

Officers: County Attorney: E. F. Bunker, Esq.
Clerk of District Court: W. L. Hays.
Sheriff: Chas. C. Esgar.

TENTH JUDICIAL DISTRICT.

Counties of Judith Basin and Fergus.

District Judges: Hon. Roy E. Ayers; Hon. Rudolph Von Tobel.

Officers of Fergus County (County Seat, Lewistown):
County Attorney: E. J. Baker, Esq.
Clerk of District Court: Bert Replogle.
Sheriff: Wm. B. Woods, Jr.

Officers of Judith Basin County (County Seat, Stanford):
County Attorney: John D. Mussey, Esq.
Clerk of District Court: F. Clark Grady.
Sheriff: C. H. Kelley.

ELEVENTH JUDICIAL DISTRICT.

Counties of Flathead and Lincoln.

District Judge: Hon. Chas. W. Pomeroy.

Officers of Flathead County (County Seat, Kalispell):
County Attorney: Dean King, Esq.
Clerk of District Court: R. N. Eaton.
Sheriff: W. R. Martin.

Officers of Lincoln County (County Seat, Libby):
County Attorney: W. H. Gray, Esq.
Clerk of District Court: Fred. F. Clark.
Sheriff: Frank R. Baney.

TWELFTH JUDICIAL DISTRICT.

County of Chouteau.

District Judge: Hon. John W. Tattan.

Officers of Chouteau County (County Seat, Fort Benton):

County Attorney: H. F. Miller, Esq.
Clerk of District Court: Geo. D. Patterson.
Sheriff: U. W. Hammaker.

THIRTEENTH JUDICIAL DISTRICT.

Counties of Carbon, Big Horn and Yellowstone.

District Judges: Hon. A. C. Spencer; Hon. Robt. C. Stong.

Officers of Big Horn County (County Seat, Hardin):

County Attorney: Louis E. Haven, Esq.
Clerk of District Court: Geo. H. Miller.
Sheriff: John MacLeod.

Officers of Carbon County (County Seat, Red Lodge):

County Attorney: C. C. Rowan, Esq.
Clerk of District Court: H. P. Sandels.
Sheriff: Wm. Smith.

Officers of Yellowstone County (County Seat, Billings):

County Attorney: E. E. Collins, Esq.
Clerk of District Court: Fred Inabnit.
Sheriff: E. M. Birely.

FOURTEENTH JUDICIAL DISTRICT.

Counties of Broadwater, Meagher and Wheatland.

District Judge: Hon. W. L. Ford.

Officers of Broadwater County (County Seat, Townsend):

County Attorney: John A. Matthews, Esq.
Clerk of District Court: Fred Bubser.
Sheriff: Chas. B. Doggett.

Officers of Meagher County (County Seat, White Sulphur Springs):

County Attorney: C. L. Tyman, Esq.
Clerk of District Court: F. H. Mayn.
Sheriff: Elmer Butler.

Officers of Wheatland County (County Seat, Harlowton):

County Attorney: W. C. Husband, Esq.
Clerk of District Court: A. T. Anderson.
Sheriff: L. W. Clark.

FIFTEENTH JUDICIAL DISTRICT.

Counties of Golden Valley, Musselshell, Rosebud and Treasure.

District Judge: Hon. Geo. A. Horkan.

Officers of Golden Valley County (County Seat, Ryegate):

County Attorney: C. W. Noyes, Esq.
Clerk of District Court: M. J. Dourte.
*Sheriff: Mrs. Jesse Garfield.

Officers of Musselshell County (County Seat, Roundup):

County Attorney: C. F. Maris, Esq.
Clerk of District Court: Henry F. Whitman.
Sheriff: Chris. H. Rusch.

Officers of Rosebud County (County Seat, Forsyth):

County Attorney: I. S. Crawford, Esq.
Clerk of District Court: D. J. Muri.
Sheriff: Cecil E. Thompson.

Officers of Treasure County (County Seat, Hysham):

County Attorney: E. D. Gerye, Esq.
Clerk of District Court: J. D. Clark.
Sheriff: T. J. Cunningham.

---

*Appointed to succeed Jesse Garfield, killed in performance of duty.

SIXTEENTH JUDICIAL DISTRICT.

Counties of Carter, Custer, Fallon, Garfield, Prairie and Powder River.

District Judges: Hon. S. D. McKinnon; Hon. S. E. Felt.

Officers of Carter County (County Seat, Ekalaka):

County Attorney: Leon L. Wheeler, Esq.
Clerk of District Court: Hallie B. Campbell.
Sheriff: Geo. S. Boggs.

Officers of Custer County (County Seat, Miles City):

County Attorney: R. B. Hayes, Esq.
Clerk of District Court: C. A. Lindeberg.
Sheriff: H. Farnum.

Officers of Fallon County (County Seat, Baker):

County Attorney: D. R. Young, Esq.
Clerk of District Court: Ralph Keener.
Sheriff: F. F. Kelling.

Officers of Garfield County (County Seat, Jordan):

County Attorney: John J. Cavan, Esq.
Clerk of District Court: J. P. MacDonald.
Sheriff: R. F. Myers.

Officers of Powder River County (County Seat, Broadus):

County Attorney: N. A. Burkey, Esq.
Clerk of District Court: H. R. Straiton.
Sheriff: W. E. Sutter.

Officers of Prairie County (County Seat, Terry):

County Attorney: Joseph C. Tope, Esq.
Clerk of District Court: S. A. Barber.
Sheriff: E. H. Brooks.

SEVENTEENTH JUDICIAL DISTRICT.

Counties of Phillips and Valley.

District Judge: Hon. Carl D. Borton.

Officers of Phillips County (County Seat, Malta):

County Attorney: B. P. Sandlie, Esq.
Clerk of District Court: C. M. Porter.
Sheriff: Thos. S. Johnson.

Officers of Valley County (County Seat, Glasgow):

County Attorney: Lincoln Working, Esq.
Clerk of District Court: J. B. Christopherson.
Sheriff: Chas. Hall.

EIGHTEENTH JUDICIAL DISTRICT.

Counties of Blaine, Hill and Liberty.

District Judge: Hon. Chas A. Rose.

Officers of Blaine County (County Seat, Chinook):

County Attorney: D. L. Blackstone, Esq.
Clerk of District Court: A. W. Ziebarth.
Sheriff: Harry F. Becker.

Officers of Hill County (County Seat, Havre):

County Attorney: Max P. Kuhr, Esq.
Clerk of District Court: Geo. W. Glass.
Sheriff: Henry F. Schwartz.

Officers of Liberty County (County Seat, Chester):

County Attorney: B. R. McCabe, Esq.
Clerk of District Court: George H. Gau.
Sheriff: John H. Morgan.

NINETEENTH JUDICIAL DISTRICT.

Counties of Glacier, Pondera, Teton and Toole.

District Judge: Hon. John J. Greene.

Officers of Glacier County (County Seat, Cut Bank):

County Attorney: Wiley J. Shannon, Esq.

Clerk of District Court: Thos. B. Magee.
Sheriff: P. A. Davis.

Officers of Pondera County (County Seat, Conrad):
County Attorney: Wm. L. Bullock, Esq.
Clerk of District Court: C. H. Shepherd.
Sheriff: Frank Stocke.

Officers of Teton County (County Seat, Chouteau):
County Attorney: George W. Magee, Esq.
Clerk of District Court: B. M. Jacobson.
Sheriff: I. S. Martins.

Officers of Toole County (County Seat, Shelby):
County Attorney: J. S. McClory, Esq.
Clerk of District Court: M. P. Lyons.
Sheriff: J. S. Alsup.

TWENTIETH JUDICIAL DISTRICT.

Counties of Daniels, Roosevelt and Sheridan.

District Judge: Hon. C. E. Comer.

Officers of Daniels County (County Seat, Scobey):
County Attorney: John S. Nyquist, Esq.
Clerk of District Court: John Shippam.
Sheriff: D. J. Martin.

Officers of Roosevelt County (County Seat, Poplar):
County Attorney: Frank M. Catlin, Esq.
Clerk of District Court: Thos. R. Forbes.
Sheriff: P. J. Nacey.

Officers of Sheridan County (County Seat, Plentywood):
County Attorney: Arthur C. Erickson, Esq.
Clerk of District Court: Carl B. Peterson.
Sheriff: L. J. Collins.

SUPREME COURT RULES.

For Rules of Supreme Court of the State of Montana, see 59 Mont. xxxv.

AMENDMENT OF RULES.

Order of Court, Made on December 27, 1921:

It is ordered that the Rules of this court be amended to read as follows:

XI.

ORAL ARGUMENT.

Time Allowed to Each Party.—Forty minutes will be allowed to appellant and thirty minutes to respondent for argument and no more, without special leave of court granted before the argument begins.

ADMISSION OF ATTORNEYS.

A. UPON EXAMINATION.

1. Examination.—Examination for admission to the Bar will be conducted by the State Board of Law Examiners, in the senate chamber of the capitol at 10 o'clock A. M. on the second Tuesday in July and the first Tuesday in December of each year.

As amended, the above rules will be in full force and effect from and after February 10, 1922.

TABLE OF CASES REPORTED—VOL. 60.

Abel, Stewart v..... 619
Aiken v. City of Glendive..... 1
Anderson, State (ex rel. Baird) v..... 515
Arnold v. Morrissey..... 526

Bannack Gold Mining Co., Pioneer Mining Co. v..... 254
Batchoff v. Butte Pacific Copper Co..... 179
Bennett, State v..... 355
Berndt, State v..... 377
Bess, State v..... 558
Blackfoot Land Development Co. v. Burks..... 544
Bode v. Rollwitz..... 481
Boles v. Boles..... 411
Bonning, State v..... 362
Boulet v. Butte Motors Car Co..... 620
Boyle v. Chicago, Mil. & St. P. Ry. Co..... 453
Briggeman v. Corrigan..... 205
Buckhouse v. Parsons..... 156
Bull Mountain Trading Co., Donovan v..... 87
Burks, Blackfoot Land Development Co. v..... 544
Butte Electric Ry. Co., Currey v..... 146
Butte Electric Ry. Co., Osterholm v..... 193
Butte Motors Car Co., Boulet v..... 620
Butte Pacific Copper Co., Batchoff v..... 179
Byrne, State v..... 317

Carter, Republic Oil Co. v..... 624
Casey v. Northern Pacific Ry. Co..... 56
Chicago, Mil. & St. P. Ry. Co., Boyle v..... 453
Chicago, Mil. & St. P. Ry. Co., Sankey v..... 242
Christe, Smith v..... 604

Christian, O'Neil v..... 460
Chronopoulos, State v..... 329
City of Butte, Leary v..... 626
City of Butte, Stettheimer v..... 111
City of Glendive, Aiken v..... 1
City of Glendive, Krug v..... 7
City of Helena, Evans v..... 577
City of Miles City v. Drum..... 451
City of Roundup, Newton v..... 24
Clary v. Fleming..... 246
Conrad v. Day-Hansen Security Co..... 623
Corrigan, Briggeman v..... 205
Costello v. Costello..... 625
County of Lewis and Clark, Majors v..... 608
Currey v. Butte Electric Ry. Co..... 146

Davis, State v..... 426
Day-Hansen Security Co., Conrad v..... 623
District Court, State (ex rel. Bourquin) v..... 626
District Court, State (ex rel. Dyer) v..... 625
District Court, State (ex rel. Seven Products Co.) v..... 620
District Court, State (ex rel. Taylor) v..... 623
District Court, State (ex rel. Troglia) v..... 622
District Court, State (ex rel. Wordal) v..... 621
Doney v. Northern Pacific Ry. Co..... 209
Donohue v. Prairie County..... 617
Donovan v. Bull Mountain Trading Co..... 87
Drum, City of Miles City v..... 451
Ducolon, State v..... 594

Estate of Fratt, In re..... 526
Evans, State v..... 367
Evans v. City of Helena..... 577

Fleming, Clary v..... 246
Folger v. Upper Glendive-Fallon Irrigation Co..... 619
Fratt's Estate, In re..... 526

Gallatin Valley Ry. Co., Le Munyon v..... 517
General Electric Co. v. Stewart..... 387
Gillett, Hogsed v..... 467
Great Northern Ry. Co., Keith v..... 505
Great Northern Ry. Co., Zanos v..... 17
Great Western Sugar Co., United States National Bank of Red Lodge v..... 342

Hassan v. Northern Pacific Ry. Co..... 105
Hawley v. Richardson..... 118
Hayden v. Lalor..... 621
Henkel, State v..... 619
Hoeller v. Moog..... 74
Hogsed v. Gillett..... 467
Hover, Martin v..... 302
Humber v. Marshall..... 267

In re Fratt's Estate..... 526
In re Jewell..... 602
In re Smith's Estate..... 276
International Harvester Co. v. Merry..... 498

Jackson v. Lomas..... 8
Jewell, In re..... 602
J. I. Case Threshing Machine Co. v. Stewart..... 380

Keith v. Great Northern Ry. Co..... 505
Krug v. City of Glendive..... 7

Lalor, Hayden v..... 621
Leary v. City of Butte..... 626
Lehman v. Sutter..... 97
Le Munyon v. Gallatin Valley Ry. Co..... 517
Lewis and Clark County, Majors v..... 608
Lomas, Jackson v..... 8

McGlynn, State v..... 416
McIlwain, State v..... 598

McKay, Mesh v. 624
McKeever v. Oregon Mortgage Co., Ltd. 270
Mackey Wall Plaster Co., United States Gypsum Co v. . . . 132
Majors v. County of Lewis and Clark. 608
Mannix v. Powell County. 510
Mares v. Mares. 36
Marshall, Humber v. 267
Martin v. Hover. 302
Mason v. Swee. 32
Merry, International Harvester Co v. 498
Mesh v. McKay. 624
Mid Northern Oil Co. v. Walker, State Treasurer. 622
Miller, Smith v. 617
Monidah Trust, Nelson v. 623
Montana Grain Growers v. Scollard. 618
Montana Grain Growers v. Weersing. 618
Moog, Hoeller v. 74
Morrissey, Arnold v. 526
Mullen, Pointer v. 620

Nelson v. Monidah Trust. 623
Newton v. City of Roundup. 24
Northern Pacific Ry. Co., Casey v. 56
Northern Pacific Ry. Co., Doney v. 209
Northern Pacific Ry. Co., Hassan v. 105
Northern Pacific Ry. Co., Price v. 166

O'Brien, State (ex rel. Hogue) v. 178
O'Neil v. Christian. 460
Oregon Mortgage Co., Ltd., McKeever v. 270
Osterholm v. Butte Electric Ry. Co. 193

Parsons, Buckhouse v. 156
Percy, State v. 618
Pioneer Mining Co. v. Bannack Gold Mining Co. 254
Pointer v. Mullen. 620
Powell County, Mannix v. 510

Prairie County, Donohue v. 617
Price v. Northern Pacific Ry. Co. 166
Prouty, State v. 310

Republic Oil Co. v. Carter. 624
Richardson, Hawley v. 118
Roberts Elevator Co., Sturm & Drake v. 239
Rollwitz, Bode v. 481

Sankey v. Chicago Mil. & St. P. Ry. Co. 242
Schrack, State v. 70
Scollard, Montana Grain Growers v. 618
Showen, State v. 474
Smith v. Christe. 604
Smith v. Miller. 617
Smith's Estate, In re. 276
Smith v. Smith. 276
State (ex rel. Baird) v. Anderson. 515
State (ex rel. Bourquin) v. District Court. 626
State (ex rel. Dyer) v. District Court. 625
State (ex rel. Hogue) v. O'Brien. 178
State (ex rel. Seven Products Co.) v. District Court. 620
State (ex rel. Taylor) v. District Court. 623
State (ex rel. Troglia) v. District Court. 622
State (ex rel. Wordal) v. District Court. 621
State v. Bennett. 355
State v. Berndt. 377
State v. Bess. 558
State v. Bonning. 362
State v. Byrne. 317
State v. Chronopoulos 329
State v. Davis. 426
State v. Ducolon. 594
State v. Evans. 367
State v. Henkel. 619
State v. McGlynn. 416

State v. McIlwain..... 598
State v. Percy..... 618
State v. Prouty..... 310
State v. Schrack..... 70
State v. Showen..... 474
State v. Stein..... 441
State v. Stevens..... 390
State v. Tripp..... 421
State v. Wallin..... 332
Stein, State v..... 441
Stephens, Terry v..... 82
Stettheimer v. City of Butte..... 111
Stevens, State v..... 390
Stewart, General Electric Co. v..... 387
Stewart v. Abel..... 619
Stewart, J. I. Case Threshing Machine Co. v..... 380
Sturm & Drake v. Roberts Elevator Co..... 239
Sutter, Lehman v..... 97
Swee, Mason v..... 32

Terry v. Stephens..... 82
Tripp, State v..... 421

Upper Glendive-Fallon Irrigation Co., Folger v..... 619
United States Gypsum Co. v. Mackey Wall Plaster Co..... 132
United States National Bank of Red Lodge v. Great Western Sugar Co..... 342

Vallance, Whitelaw v..... 172

Walker, State Treasurer, Mid Northern Oil Co. v..... 622
Wallin, State v..... 332
Weersing, Montana Grain Growers v..... 618
Western Life & Casualty Co., Wick v..... 553
Whitelaw v. Vallance..... 172
Wick v. Western Life & Casualty Co..... 553

Zanos v. Great Northern Ry. Co..... 17

TABLE OF CASES CITED—VOL. 60.

(For Cases Cited from the Montana Reports, see Table at End of this Volume.)

Agnew v. McElroy, 10 Smedes & M. (Miss.) 552..... 300
Alcorn v. Busche, 133 Cal. 655..... 535
Alcorn v. Gieseke, 158 Cal. 396..... 535
Allen v. Bank, 120 U. S. 20..... 351
American Railway Co. v. Coronas, 230 Fed. 545..... 228
Anderson v. Chicago etc. Ry. Co., 85 Minn. 337..... 31
Andrade v. Superior Court, 75 Cal. 459..... 49
Anheuser-Busch B. Assn. v. McGowan, 49 La. Ann. 630..... 189
Armstrong v. Reide, 47 Misc. Rep. (N. Y.) 609..... 177
Atchison etc. R. Co. v. O'Connor, 223 U. S. 280..... 382
Atchison etc. R. Co. v. Young, 102 Kan. 875..... 230
Atherton v. Fowler, 46 Cal. 320..... 203
Atlantic Coast L. R. Co. v. Burnette, 239 U. S. 199..... 228
Atlanta R. etc. Co. v. Owens, 119 Ga. 833..... 69

Bacon v. Davis, 9 Cal. App. 83..... 274
Balch v. Shaw, 7 Cush. 282..... 154
Baltic Min. Co. v. Massachusetts, 231 U. S. 68.....382 *et seq.*
Bardon v. Northern Pac. R. R. Co., 154 U. S. 288..... 493
Bay Rock Co. v. Bell, 133 Cal. 150..... 590
Beadle v. Kansas City etc. Ry. Co., 51 Kan. 248..... 237
Beaudry v. Valdez, 32 Cal. 270..... 591
Belk v. Meagher, 104 U. S. 279..... 102
Benavides v. Benavides (Tex. Civ. App.), 218 S. W. 566..... 351
Benjamin v. Benjamin, 15 Conn. 347..... 164
Bennett v. Grand Rapids & I. R. Co., 194 Mich. 64..... 228
Beutell v. Magone, 157 U. S. 154..... 163
Bigelow v. Old Dominion C. Co., 225 U. S. 111..... 292
Big Horn Lumber Co. v. Davis, 14 Wyo. 455..... 351
Bissell v. Fletcher, 19 Neb. 725..... 495
Black v. Black 149 Cal. 224..... 415
Black v. Diver, 68 Kan. 508..... 492
Blair v. Blair, 40 Utah, 306..... 415
Boglino v. Giogetta, 20 Cal. App. 338..... 493
Boroug etc. v. Atlantic C. E. Co., 68 N. J. L. 73..... 177
Brown v. Gurney, 201 U. S. 184..... 102
Brown v. Higginbotham, 5 Leigh (Va.), 583..... 53
Brown v. Chaney, 1 Kelly (Ga.), 412..... 299
Brown v. Rogers, 61 Ind. 449..... 351
Buckley v. Tacoma, 9 Wash. 256..... 590
Buddenberg v. Chouteau T. Co., 108 Mo. 394..... 202
Bullard v. Stone, 67 Cal. 477..... 241
Burns v. Merchants' etc., 26 Tex. Civ. App. 223..... 203
Burton v. Larkin, 36 Kan. 246..... 274

Bush v. Clark, 17 Mass. 111..... 49
Bussard & Robson v. Hibler, 42 Or. 500..... 176
Butler v. Kemmerer, 218 Pa. 242..... 94
Butterfield v. Forrester, 11 East, 61..... 15
Butts v. Newton, 29 Wis. 639..... 165

Carbrey v. Willis, 7 Allen (Mass.), 364..... 264
Cass v. People ex rel. Kochersperger, 166 Ill. 126..... 590
Chesapeake & Ohio Ry. Co. v. Kelly, 241 U. S. 485..... 23
Chicago etc. Ry. Co. v. Gish, 79 Okl. 8..... 237
Chung Kee v. Davidson, 73 Cal. 522..... 274
Churchill v. Buck, 102 Fed. 38..... 351
Cincinnati etc. R. Co. v. Rankin, 241 U. S. 319..... 229
City of Genesco v. Brown, 250 Ill. 165..... 590
City of Jeffersonville v. Shallcross Co., 35 Ind. 19..... 351
City of Kirksville v. Coleman, 103 Mo. App. 215..... 590
City of Ottawa v. Gilliland, 63 Kan. 165..... 21
Clay v. City of Grand Rapids, 60 Mich. 451.....590, 591
Clement v. Rowe, 33 S. D. 499..... 163
Coe v. Coe, 75 Or. 145..... 252
Commonwealth v. Best, 180 Mass. 492..... 326
Conger v. Atwood, 28 Ohio St. 134..... 52
Cook v. Mix, 10 Conn. 565..... 189
Corico v. Smith, 97 Misc. Rep. (N. Y.) 447..... 228
Crawford v. Ahrnes, 103 Mo. 88..... 551
Crescent City Co. v. Butchers' Union Co., 120 U. S. 141.....29 *et seq.*
Crim v. Kessing, 89 Cal. 486..... 154
Cromwell v. County of Sac, 94 U. S. 351..... 293

Damron v. State, 58 Tex. Cr. 255..... 365
Daube & Knapp v. Chicago etc. Ry. Co., 39 Tex. Civ. App. 24..... 245
Davidson v. Nicholson, 59 Ind. 411..... 514
Davis v. Megroz, 55 N. J. L. 427..... 53
Deal v. Sclomberg, 20 Nev. 330..... 539
De Burg v. Armenta, 22 N. M. 443..... 163
De Luna v. Union Ry. Co., 130 App. Div. 386..... 203
Donnelly v. Howard, 60 Cal. 291..... 591
Dooley v. Town of Sullivan, 112 Ind. 451..... 110
Dorey v. Brodis, 153 Cal. 673..... 171
Dowell v. Applegate, 152 U. S. 327..... 294
Drew v. Claypool, 61 Mich. 233..... 189
Driscoll v. Market St. C. Ry. Co., 97 Cal. 553..... 67
Dupasseur v. Rochereau, 21 Wall. 135..... 291

Elliott v. Rhett, 5 Rich. (S. C.) 405..... 265
Embry v. Palmer, 107 U. S. 3..... 291
Empire State C. Co. v. Atchison Ry. Co., 210 U. S. 2..... 163
Estate of Letellier, 74 Cal. 311..... 535
Estate of Spreckels, 5 Cof. Prob. Dec. 348..... 537
Estate of Young, 149 Cal. 173..... 535
Esty v. Currier, 98 Mass. 500.....352, 353
Ewing v. Burnet, 11 Pet. 52..... 265

Fairplay School Township v. O'Neal, 127 Ind. 95..... 94
Farrell v. Lockhart, 210 U. S. 142..... 102
Fay v. Reed, 128 Cal. 357..... 590

Fay v. Wenzell, 8 Cush. 315..... 154
Feddern v. State, 79 Neb. 651..... 328
Fillmore v. Jennings, 78 Cal. 634..... 491
Foley v. Foley, 120 Cal. 33..... 191
Fontana v. United States (C. C. A.), 262 Fed. 283..... 420
Ford v. Umatilla Co., 15 Or. 313..... 202
Foster v. Railway Co., 115 Mo. 165..... 110
Fowler v. Wood, 73 Kan. 511..... 493
Franklin v. Tonjours, 1 White & W. Civ. Cas. (Tex.) 506..... 51
Franklin v. Philadelphia etc. Ry. Co., 203 Fed. 134..... 236
Franklin v. Trickey, 9 Ariz. 282..... 53
Frink v. Frink, 43 N. H. 508..... 154

Galbraith v. Lowe, 142 Cal. 295..... 171
Garvin v. Squires, 9 Ark. 533..... 144
Gauthier v. Morrison, 232 U. S. 452.....493 *et seq.*
General Ry. Signal Co. v. Virginia, 246 U. S. 500..... 383
German American S. Bank v. Gollmer, 155 Cal. 683..... 514
Gillett v. Board of Trade, 46 Mich. 309..... 351
Graham Ice Co. v. Chicago etc. Ry. Co., 153 Wis. 145.....233 *et seq.*
Green v. Prince (Tex. Civ. App.), 201 S. W. 200..... 351
Griffin v. Board of Commissioners, 20 S. D. 142..... 187
Groth v. Thomann, 110 Wis. 488..... 68
Gwillim v. Donnellan, 115 U. S. 45..... 102
Gwillim v. First Nat. Bank, 13 Colo. 278..... 189

Haley v. Case, 142 Mass. 323..... 110
Haley v. Mobile & O. R. Co., 7 Baxt. 239..... 203
Hall v. First Nat. Bank, 173 Mass. 16..... 96
Hamilton v. Hubbard, 134 Cal. 603.....250, 251
Hancock Nat. Bank v. Farnum, 17 U. S. 640.....291, 292
Hardin v. Jordan, 140 U. S. 371..... 492
Hardin v. Shedd, 190 U. S. 508..... 492
Harrison v. Denver R. Co., 7 Utah, 523..... 110
Hartigan v. Southern Pac. R. Co., 86 Cal. 142.....184, 185
Hatfield v. Cabell County Ct., 75 Va. 595..... 351
Hawaiian Trust Co. v. Von Holt, 216 U. S. 367..... 539
Hess v. Lowrey, 122 Fed. 225..... 570
Hewitt Logging Co. v. Northern Pac. Ry. Co., 97 Wash. 597.. 228 *et seq.*
Hicklin v. McClear, 18 Or. 126..... 552
Hickman v. Johnson, 36 Cal. App. 342..... 504
Hills v. Hopp, 287 Ill. 375..... 351
Himmelman v. Satterlee, 50 Cal. 68..... 591
Hirsch v. Remick Co., 38 Cal. App. 764..... 184
Hoffman v. Schwaebe, 33 Barb. (N. Y.) 194..... 273
Hole v. Page, 20 Wash. 208..... 189
Holton v. Noble, 83 Cal. 7..... 504
Horne v. Smith, 159 U. S. 40..... 496
Howard Supply Co. v. Chesapeake & O. Ry. Co., 162 Fed. 188..... 236
Hughes v. State, 109 U. S. 397..... 328
Hurey v. Leavitt, 93 N. J. L. 299..... 351

Illinois Steel Co. v. Schymanowski, 59 Ill. App. 32..... 110
In re Brown's Estate, 143 Cal. 450..... 538
In re Euston's Will, 113 N. Y. 174..... 542
In re Howell's Estate, 34 Misc. Rep. (N. Y.) 432..... 543

In re Hoyt, 31 Misc. Rep. (N. Y.) 720 543
In re Kaye, 35 Fed. 288 616
In re Lewis' Estate, 39 Nev. 445 537
In re McPherson, 104 N. Y. 306 542
In re Ross' Estate, 140 Cal. 282 527
In re Vassar, 127 N. Y. 1 542
In re Wright, 134 U. S. 136 154
International Agr. Corp. v. Abercrombie, 184 Ala. 244 21
International Paper Co. v. Massachusetts, 246 U. S. 135 .....384, 389
International Text Book Co. v. Pigg, 217 U. S. 91 382
Irvine v. Angus, 93 Fed. 629 351

Jahnke v. State, 68 Neb. 154 432
Jenkins v. Hankins, 98 Tenn. 545 203
Johnson v. Gilmore, 6 S. D. 276 176
Johnson v. Minneapolis etc. Co., 67 Minn. 141 110
Johnson v. State, 1 Okl. Cr. 321 432
Johnson v. Totten, 3 Cal. 343 53
Jones v. Barber A. P. Co., 174 Mo. 393 590
Jones v. Leonardt, 10 Cal. App. 284 184

Kansas City etc. R. Co. v. Botkin, 249 U. S. 227 383
Kansas City etc. R. Co. v. Stiles, 242 U. S. 111 383
Karrick v. Wetmore, 210 Mass. 578 153
Kaufman v. Shain, 111 Cal. 16 154
Kean v. Calumet Canal Co., 190 U. S. 452 492
Kinney v. Folkerts, 84 Mich. 616 23
Kinsler v. McCants, 4 Rich. (S. C.) 46 53
Kraimer v. State, 117 Wis. 350 328

Ladd v. Spencer, 23 Or. 193 590
Lafayette etc. Society v. Norton, 202 N. Y. 379 250
La Franchi v. City of Seattle, 78 Wash. 158 590
Lalor v. City of New York, Ann. Cas. 1916E, 572 69
Lambert v. Cummings, 2 Cal. App. 642 590
Lampman v. Milks, 21 N. Y. 505 .....263, 264
Landregan v. Peppin, 94 Cal. 465 514
Lane v. United Ry. Co., 90 Conn. 35 203
Lawrence v. Fox, 20 N. Y. 268 273
Leahy v. Davis, 121 Mo. 227 203
Lee v. Woolsey, 109 Pac. 124 110
Lemmers v. Nissen, 4 Neb. 245 495
Lilly Co. v. Northern Pac. Ry. Co., 64 Wash. 589 230
Little v. Southern Ry. Co., 120 Ga. 347 16
Lloyd v. North Carolina R. R. Co., 151 N. C. 536 16
Locomobile Co. v. Massachusetts, 246 U. S. 146 386
Loevenhart v. Lindell Ry. Co., 190 Mo. 342 203
Looney v. Crane Co., 245 U. S. 178 .....384, 385
Louisville etc. Ry. Co. v. Buck, 116 Ind. 566 16
Ludwig v. Western U. Tel. Co., 216 U. S. 146 382
Lyle v. Lyle, 86 Tenn. 372 415

McBean v. Redick, 96 Cal. 191 590
McBride v. Steinweden, 72 Kan. 508 492
McCarthy v. St. Louis T. Co., 192 Mo. 396 203
McElwaine v. Commonwealth, 154 Ky. 242 325

McGonigle v. Gordon, 11 Kan. 167 351
McGrath v. Merwin, 112 Mass. 467 16
McIntosh v. Standard Oil Co., 89 Kan. 289 202
McKay v. Joy, 70 Cal. 581 47
MacIntosh v. Kimball, 101 App. Div. (N. Y.) 494 93
Manufacturers' Ry. Co. v. United States, 246 U. S. 457 237
Marinai v. Dougherty, 46 Cal. 26 203
Martin v. Murphy, 221 Ill. 632 263
Mason v. Sioux Falls, 2 S. D. 640 ..... 590, 591
Maynard v. Richards, 166 Ill. 466 53
Mendenhall v. Harrisburg W. P. Co., 27 Or. 38 460
Meyer v. Hart, 23 App. Div. (N. Y.) 131 203
Milk Co. v. Eagle Mfg. Co., 47 App. D. C. 191 351
Mitchell C. & C. Co. v. Pennsylvania Ry. Co., 230 U. S. 247 236
Mitchell v. Aten, 37 Kan. 33 189
Moore v. Smith, 182 Fed. 540 ..... 288 *et seq.*
Moore v. United States, 160 U. S. 268 339
Moss v. Ramey, 239 U. S. 538 ..... 494, 497
Munroe v. Pacific Con. Co., 84 Cal. 515 184
Murphy v. New York C. Ry., 170 App. Div. (N. Y.) 788 236

New York etc. R. R. Co. v. Beaham, 242 U. S. 149 230
Niles v. Cedar P. Club, 175 U. S. 300 496
Northern Pac. Ry. Co. v. Solun, 247 U. S. 477 235
Northwestern Thresher Co. v. McNinch, 42 Okl. 158 459
Nottage v. Sawmill Phoenix (C. C.), 133 Fed. 979 16

Oland v. Mackintosh, 45 Nova Scotia, 13 263
O'Neill v. Massachusetts Ben. Assn., 63 Hun, 292 557
O'Rear v. Lazarus, 8 Colo. 608 189
Owens v. State, 120 Ga. 296 402

Pacific Paving Co. v. Verso, 12 Cal. App. 362 590
Painter v. Painter's Estate, 68 Cal. 395 52
Pape v. Bank, 20 Kan. 440 353
Parker v. Newitt, 18 Or. 274 252
Partridge v. Lucas, 99 Cal. 519 ..... 590, 591
Paul v. Williams, 59 Hun, 625 539
Peck v. City of Grand Rapids, 125 Mich. 416 590
Pierce v. Wagner, 29 Minn. 355 31
Pennsylvania Ry. Co. v. International Coal Co., 230 U. S. 184 230
People v. Faber, 199 N. Y. 256 571
People ex rel. Kockersperger v. Hurford, 167 Ill. 226 590
People v. Brown, 105 Cal. 66 340
People v. Byrne, 160 Cal. 217 ..... 326, 436
People v. Dodge, 104 Cal. 487 189
People v. Elliott, 80 Cal. 296 432
People v. Foglesong, 116 Mich. 556 328
People v. Fowler, 178 Cal. 657 402
People v. Holmes, 118 Cal. 444 328
People v. Lang, 142 Cal. 482 477
People v. Petros, 25 Cal. App. 236 425
People v. Phelan, 123 Cal. 551 326
People v. Ward, 141 Cal. 628 154
People v. Warr, 22 Cal. App. 663 440
People v. Way, 119 App. Div. (N. Y.) 344 326
People v. Wilkinson, 30 Cal. App. 473 440

People v. Youngs, 122 Mich. 293..... 425
Pettingill v. Porter, 8 Allen (Mass.), 1..... 264
Phillips Co. v. Grand Western T. Ry. Co., 236 U. S. 663..... 228
Phillips v. London etc. Ry., 2 Q. B. Div. 78..... 203
Piedmont v. Allman, 136 Cal. 88.....590, 591
Pittman v. Pittman, 3 Or. 553..... 415
Pittsburgh Ry. v. Loan & Trust Co., 172 U. S. 510.....291, 292
Pittsburgh etc. Ry. Co. v. Long Island etc. Co., 172 U. S. 493..... 292
Pope v. Terre Haute C. M. Co., 107 N. Y. 61..... 177
Producers' Oil Co. v. Hanzen, 238 U. S. 325..... 492
Pullman Co. v. Kansas, 216 U. S. 56..... 382

Railroad Co. v. Caldwell, 8 Kan. 244..... 353
Railroad Co. v. Houston, 95 U. S. 697..... 509
Rawitzer v. St. Paul C. Ry. Co., 94 Minn. 494..... 203
Remnant v. Hoffman (Cal.), 11 Pac. 319..... 189
Rheingans v. Smith, 161 Cal. 362..... 504
Rhyner v. City of Menasha, 107 Wis. 201..... 202
Roberts v. Corbin, 28 Iowa, 355..... 351
Robinson v. Baltimore & O. R. Co., 222 U. S. 247..... 236
Ross v. Wellman, 102 Cal. 1..... 189
Ruiz v. Santa Barbara G. & E. Co., 164 Cal. 188..... 184

Salmon v. Rathjens, 152 Cal. 290..... 184
Saltonstall v. Russell, 152 U. S. 628.....352, 353
Sambos v. Cleveland etc. R. R., 134 Mo. App. 460..... 110
Sanger v. Chicago, 169 Ill. 286..... 590
San Jose Co. v. Auzerais, 106 Cal. 498..... 590
Santa Fe etc. Co. v. Atchison etc. Ry. Co., 21 N. M. 496..... 236
Savage v. Davis, 18 Wis. 608..... 165
Schwiesau v. Mahon, 128 Cal. 114..... 590
Scott v. Lattig, 227 U. S. 229.....494 *et seq.*
Scudden v. Worcester, 11 Cush. (Mass.) 573.....352, 353
Secord v. Schroeder L. Co., 160 Wis. 1..... 23
Sewell v. People, 189 Ill. 174..... 328
Siemsen v. Oakland etc., 134 Cal. 494..... 449
Silberstein v. Wicke Co., 22 N. Y. Supp. 170..... 204
Slaughter v. Goldberg, Bowen Co., 26 Cal. App. 318..... 184
Smith v. Chicago, 214 Ill. 155..... 590
Smith v. Chicago etc. Ry. Co., 6 S. D. 583..... 203
Smith v. Smith (D. C.), 210 Fed. 947.....288 *et seq.*
Smith v. Smith (C. C. A.), 224 Fed. 465.....288 *et seq.*
Smith v. State, 61 Tex. Crim. 328..... 480
Southern Pac. R. Co. v. United States, 168 U. S. 1..... 301
Spear v. Hiles, 67 Wis. 361..... 129
Spence v. Damrow, 32 Neb. 112..... 203
Spinning v. Pugh, 65 Wash. 490..... 492
Starrett v. Baudler, 181 Iowa, 965..... 264
State Bank v. Norduff, 2 Kan. App. 55.....352, 353
State v. Bailey, 79 Conn. 589..... 325
State v. Beedle (Mo.), 180 S. W. 888..... 328
State v. Bouline, 107 La. 454..... 154
State v. Caseday, 58 Or. 429..... 432
State v. Haworth, 24 Utah, 398..... 328
State v. Hoerr, 88 Kan. 573..... 328
State v. Pray, 30 Nev. 206..... 597
State v. Reinhart, 26 Or. 466..... 402

State v. Remington, 50 Or. 99 325
State v. Rodriguez, 23 N. M. 156 479
State v. Starr, 52 La. Ann. 610 328
State v. Taylor, 47 Or. 455 425
State v. Teale, 154 Iowa, 677 325
State v. Ware, 59 Wash. 526 328
State v. Welty, 65 Wash. 244 432
State v. Winstanley, 154 Ind. 443 340
St. George v. Biddeford, 76 Me. 593 438
St. Louis etc. R. Co. v. Arkansas, 235 U. S. 350 383
St. Louis v. Rutz, 138 U. S. 226 493
Steers v. City of Brooklyn, 101 N. Y. 51 491
Such v. Cleveland etc. R. Co., 2 Ohio Dec. (Repr.) 352 203
Sun Dial Ranch v. May Land Co., 61 Or. 205 492
Swift v. Johnson, 175 Mo. App. 660 96

Tann v. Western P. Ry. Co., 39 Cal. App. 377 184
Tappendorff v. Downing, 7 Cal. 169 491
Taylor v. Miles, 19 Or. 550 250
Taylor v. Millard, 118 N. Y. 244 264
Territory v. Lobato, 17 N. M. 666 325
Texas Midland R. R. Co. v. Atherton (Tex. Civ.), 123 S. W. 704 21
Theller v. Such, 57 Cal. 447 49
The Odin, 1 Rob. Adm. 248 68
Thompson v. Burtis, 65 Kan. 674 203
Thompson v. Bettens, 94 Cal. 82 275
Thomson v. Gortner, 73 Md. 474 93
Thrawley v. State, 153 Ind. 375 325
Tolchinsky v. Schiff, 47 Misc. Rep. 371 203
Town of Jaffrey v. Smith, 76 N. H. 168 154
Turner v. State, 89 Tenn. 547 326

United States v. Merchants' etc. Assn., 242 U. S. 178 236
United States v. Mission Rock Co., 189 U. S. 391 492
United Press v. New York Press Co., 164 N. Y. 94 94
Usher v. Scranton Ry. Co. (C. C.), 132 Fed. 405 203

Varney v. Ditmars, 217 N. Y. 223 94
Voshefskey v. Hillside C. & I. Co., 21 App. Div. (N. Y.) 168 16

Walker v. New Mexico etc. R. Co., 165 U. S. 593 523
Wallace v. Driver, 61 Ark. 429 493
Warner v. Talbot, 112 La. 817 203
Warren v. Chambers, 25 Ark. 120 493
Watts v. Montgomery T. Co., 175 Ala. 102 15
Webster v. Norwegian Milling Co., 137 Cal. 399 184
Wells v. Gabutt, 132 N. Y. 430 264
Welch v. Welch, 33 Wis. 534 415
West Roxbury v. Minot, 114 Mass. 546 352
West v. Lanier, 28 Tenn. (Humph.) 9 265
Western Stage Co. v. Walker, 2 Iowa, 504 53
Western Union Tel. Co. v. Kansas, 216 U. S. 1 ..... 382 *et seq.*

Whisenant v. Schawe (Tex. Civ.), 141 S. W. 146..... 21
Whitaker v. McBride, 197 U. S. 510..... 491
White v. East Side M. Co., 84 Or. 224..... 154
Whitten v. Whitten, 70 W. Va. 422..... 250
Wilganowski v. State, 78 Tex. Crim. 328..... 326
Willard v. Wood, 135 U. S. 309.....352, 353
Wilson & Co. v. United States, 245 U. S. 29.....492, 494
Wilson v. United States, 162 U. S. 613.....374, 377
Winsor Coal Co. v. Chicago etc. R. Co., 52 Fed. 716..... 237
Wood v. McAlpine, 85 Kan. 657..... 492
Wright v. Union Pac. Ry. Co., 22 Utah, 338..... 21

CASES DETERMINED

IN THE

SUPREME COURT

AT THE

MARCH TERM, 1921.

THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. FRANK B. REYNOLDS,
THE HON. CHARLES H. COOPER,
THE HON. WILLIAM L. HOLLOWAY,
THE HON. ALBERT J. GALEN,
} Associate Justices.

AIKEN ET AL., RESPONDENTS, *v.* CITY OF GLENDIVE, ET AL., APPELLANTS.

(No. 4,803.)

(Submitted April 11, 1921. Decided May 6, 1921.)

[197 Pac. 1003.]

Cities and Towns—Special Improvement Districts—Injunction—Resolution of Intention—Sufficiency.

Cities and Towns — Special Improvements — Resolution of Intention — Sufficiency.

1. A resolution of intention to create a special improvement district, the title of which stated that it was a "resolution of intention," *etc.*, the body of which substantially contained the recitals required by statute and advised the taxpayers of the time and place where their objections to its creation would be heard, was sufficient as against the objection that in it the city council had not declared its intention to create it.

Judgment on Pleadings—When Improper.

2. Where an issue of fact is raised by the allegations of the complaint by denials controverting them, a judgment on the pleadings is improper.

[60 Mont. 1.]

Cities and Towns—Special Improvements—Irregularities in Procedure.

3. Omission of the city council, after it had acquired jurisdiction to proceed with the creation of a special improvement, to officially designate a newspaper in the city in which notices inviting proposals for constructing the special improvement contemplated should be published, was an irregularity which, in the absence of averment of injury because thereof, was insufficient to warrant a decree enjoining defendant city from creating the district.

Same—Mistake in Publishing Notice—When Insufficient to Invalidate Proceedings.

4. Under section 34, Chapter 89, Laws of 1913, any error in or departure from the mode of publication of any notice incident to the creation of a special improvement district is insufficient to invalidate the proceedings, when it appears that the notice was actually published for the time required by the Act.

Appeal from District Court, Dawson County; C. C. Hurley, Judge.

ACTION by A. E. Aiken and others to enjoin the city of Glendive and its council from creating a special improvement district. Judgment for plaintiffs. Defendants appeal. Reversed.

Mr. N. M. Coursolle, for Appellants, submitted a brief and argued the cause orally.

No appearance in behalf of Respondents.

MR. JUSTICE COOPER delivered the opinion of the court.

The plaintiffs instituted this action in the court below to enjoin the city authorities of the city of Glendive from creating Special Improvement Paving District No. 1 under Chapter 89 of the Laws of 1913, as amended by Chapters 142 and 175 of the Laws of 1915.

The points upon which plaintiffs contend the action of the city council is not well founded are:

1. That in adopting Resolution No. 43A, the initial step taken by the city council, it did not therein pronounce and declare its intention to create Special Improvement District No. 1.

2. It did not, by any resolution, motion or order whatsoever, authorize, order or direct the city clerk to inform the

owners of each lot embraced within its boundaries of its passage.

3. That while notice to contractors was published in the "Yellowstone Monitor," a newspaper published in the city of Glendive, that paper was not formally designated by the city council as the official newspaper for the publication thereof.

The latter allegation of the complaint is admitted in the answer. A motion for judgment on the pleadings urged by plaintiffs was sustained by the district court, and judgment entered thereon. This appeal is from the judgment.

It is insisted by the city that there is an intention [1] expressed in the resolution that the city council will thereafter create Special Improvement Paving District No. 1. By reference to the title of the resolution, the *intention* to create the district is plain. The initial words of the title are: "A Resolution of Intention to Create a Special Improvement Paving District," *etc.* It also designates the number of the proposed improvement paving district, describes its boundaries, gives the character of the improvements to be made, the approximate cost, the method of assessment and payment of the cost, and the time and place when the council will hear objections to its final passage. In the body of the resolution are recitals to the effect that it is deemed to the best public interest, convenience and necessity that Special Improvement Paving District No. 1 should be created, followed by an enumeration of the steps the council will follow. July 7, 1920, at 8 P. M., at the city hall is fixed as the time and place for the hearing of any and all protests against the proposed work, or against the extent or creation of the district to be assessed, or both. Section 8 of the resolution expressly invites the taxpayers interested to be present and to make such objection to the proposed action of the city council as they may elect. Thus the suggestion that it is a resolution *creating* rather than one *declaring its intention* to create the proposed improvement district is com-

pletely answered. If the taxpayers are apprised of the proposed action, and are afforded an opportunity to appear and preserve their rights, the statute is satisfied. Only a failure of the city council to pursue the course indispensable to the validity of the proceeding will defeat its jurisdiction. Such is the holding of this court in *Shapard* v. *City of Missoula,* 49 Mont. 269, 141 Pac. 544, where the question raised in a different way was disposed of as follows: "A mere informality in the resolution ought not to render the effort to acquire jurisdiction nugatory, and doubtless would not, if the subsequent proceedings in pursuance of it were in conformity to the statute."

The title of Resolution 45A is as follows: "A Resolution Creating Special Improvement Paving District Number One in Accordance With Resolution Number 43A, Passed on the 17th day of June, A. D. 1919, Being the Resolution of Intention to Create said Special Improvement Paving District Number One." There is then set out the following: "WHEREAS, Resolution number 43A was passed by the Council of the City of Glendive, on the 17th day of June, A. D. 1919, of the intention to create Special Improvement Paving District Number One, for the purpose of paving the streets, therein said streets and avenues being set out in said resolution of intention and said streets and avenues being within a district therein described and due notice having been given of the intention to create such paving district as required by law," *etc.* Then follows a description of the territory included within the district, the character of the improvements to be made, the approximate cost, the method of assessment and payment of the cost. The steps thus taken by the city council constitute substantial compliance with the provisions of the Act requiring notice of intention and action by the city authorities to create the improvement district contemplated.

In *Harvey* v. *Town of Townsend,* 57 Mont. 407, 188 Pac. 897, a similar resolution passed for the same purpose was couched in the following language: "Be it Resolved by the

council of the town of Townsend: Section 1. That a special improvement district to be known and designated as Special Improvement District No. 7 be and the same is hereby created and this shall be deemed a resolution of intention to create," *etc.* As here, the resolution concluded with a paragraph setting the time and place at which objections to the creation of the district could be made by the taxpayers and heard by the board. Of this, it was said: "We think this record discloses a substantial compliance with the provisions of the statute in so far as the resolution of intention is concerned (*Allen* v. *City of Butte*, 55 Mont. 205, 175 Pac. 595), and distinguishes this case from *Cooper* v. *City of Bozeman*, 54 Mont. 277, 169 Pac. 801." When the intention of the city council is made manifest by the language of the resolution itself, and the requirements of the law affecting the substantial rights of the interested property-holders embraced therein are recognized and respected, they have no cause to complain of a technical departure from the statute in form merely. In the present case the resolution advised the taxpayers of its intention to create the improvement district, notified them of the time and place of the hearing, and of the further fact that their protests would then and there be heard and determined. More they could not reasonably claim.

The complaint alleges that the notice was published in the [2] "Yellowstone Monitor," and by the city clerk mailed to the record owners of each lot included in the special improvement district, addressed to the last known address of each owner; but that neither the publication nor the mailing was authorized by any resolution, motion or order of the city council. These allegations are met by a general denial; and also an affirmative allegation that on June 17, 1919, the city council of the city of Glendive instructed the city clerk to give notice of the passage of the resolution of intention "in accordance with the law." In this state of the pleadings, therefore, an issue of fact is presented as to whether the allegations of the complaint in that respect are true or not. The denials and affirmative allegations of the answer are spe-

cific, and controvert the allegations of the complaint they were intended to meet. (*Moore* v. *Murray*, 30 Mont. 13, 75 Pac. 515.)

In the last attack upon the proceedings no complaint is [3] made because the notice to contractors does not contain information sufficient to advise them of the character and extent of the improvements contemplated to enable them to act intelligently in submitting bids thereon. The charge merely is that the city council never officially designated any newspaper of the city of Glendive as the paper in which notices inviting proposals for the paving of the district should be published. A reference to the notice published, however, convinces us that it is sufficient in all respects to meet the requirements of the statute in that regard; and that no damage could result to the plaintiffs or taxpayers within the district by reason of the failure of the city council to observe the mere letter of the statute. The omission of the council in that particular occurred after it had acquired jurisdiction, and was therefore an irregularity—an oversight which it could, and doubtless would, correct, if in its judgment the best interests of the district and the substantial rights of the taxpayers affected required it to do so. Furthermore, it was [4] a misprision the legislature anticipated in section 34 of Chapter 89 of the Laws of 1913, when it enjoined upon the city clerk the duty of publishing and posting notices, resolutions and orders the city council might overlook, the effect of which would be to preserve the integrity of the notice, when actually published and posted for the time the Act requires. In the absence of an averment of injury to plaintiffs and others similarly situated by reason thereof, none can be presumed.

The judgment of the district court is reversed, with directions to reinstate the action and to proceed according to the views herein expressed.

Reversed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, HOLLOWAY and GALEN concur.

KRUG ET AL., RESPONDENTS, v. CITY OF GLENDIVE, APPELLANTS.

(No. 4,804.)

(Submitted April 11, 1921. Decided May 6, 1921.)

[197 Pac. 1005.]

(For syllabus, see *Aiken et al.* v. *City of Glendive et al.*, *ante*, p. 1.)

Appeal from District Court, Dawson County; C. C. Hurley, Judge.

ACTION by Charles Krug and another against the City of Glendive and its council, to enjoin defendants from creating a certain special improvement district. From a judgment for plaintiffs, defendants appeal. Reversed.

Mr. N. M. Coursolle, for Appellants, submitted a brief and argued the cause orally.

No appearance in behalf of Respondents.

MR. JUSTICE COOPER delivered the opinion of the court.

This action was instituted to enjoin the authorities of the city of Glendive from creating Special Improvement Paving District No. 2. The proceedings had by the city council, the disposition made of the cause by the district court, and the contentions urged by counsel are in all particulars like those passed upon in cause No. 4,803 (*Aiken* v. *City of Glendive, ante*, p. 1). Upon the authority of that case, the judgment of the district court is reversed and the cause remanded, with directions to reinstate the action.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, HOLLOWAY and GALEN concur.

ELMER JACKSON, RESPONDENT, *v.* LOMAS, APPELLANT.

(No. 4,321.)

(Submitted April 12, 1921. Decided May 6, 1921.)

[198 Pac. 434.]

Personal Injuries—Cities and Towns—Explosives—Minors—Violation of Ordinances—Parties in Pari Delicto—Effect on Right to Recover.

Minors—Violation of Penal Ordinances—Accountability.

1. A minor (twelve years old) is chargeable with the obligation of refraining from violation of penal statutes or city ordinances.

Personal Injuries—Parties *in Pari Delicto*—Violation of Statute or Ordinance—Negligence *Per Se*—Exception to Rule.

2. The rule that the violation of a penal statute or ordinance by one resulting in injury to another is negligence *per se* does not apply where the wrongdoer and the injured party are *in pari delicto*.

Same—Cities and Towns—Explosives—Violation of Penal Ordinance—Parties *in Pari Delicto*—Effect.

3. A city ordinance prohibited the sale, as well as the discharge, of fireworks, *etc.*, within the city limits. A minor purchased a package of firecrackers from defendant, discharged one and was injured. *Held*, that having been *in pari delicto* with defendant in violating the ordinance, he could not recover damages for the injuries sustained.

Appeals from District Court, Silver Bow County; Edwin M. Lamb, Judge.

ACTION by Elmer Jackson, by his guardian *ad litem*. W. M. Jackson, against C. T. Lomas. Judgment for plaintiff. Defendant appeals from it and from the order denying his motion for a new trial. Reversed and remanded, with direction to enter judgment in favor of defendant.

Mr. F. C. Fluent, for Appellant, submitted a brief and argued the cause orally.

A person is liable only for acts of negligence which proximately cause the injury alleged. If the violation of the ordi-

---

3. Liability for injuries resulting from discharge of fireworks, see notes in 5 Ann. Cas. 539; 13 Ann. Cas. 547.

nance pleaded was not the proximate cause of the injury, then defendant is not liable. (*Meyer* v. *King*, 72 Miss. 1, 35 L. R. A. 474, 16 South. 245.) The proximate cause of an injury is that which in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury and without which the injury would not have occurred. (*Therriault* v. *England*, 43 Mont. 376, 116 Pac. 581.) The only violation of the ordinance by defendant pleaded was the sale of a package of firecrackers. This sale was not the proximate cause of the injury. (*Meyer* v. *King*, *supra*; *Poland* v. *Earhart*, 70 Iowa, 285, 30 N. W. 637; *Hartnett* v. *Boston Store of Chicago*, 265 Ill. 331, L. R. A. 1915C, 460, 106 N. E. 837; *Dubois* v. *Luthmers*, 147 Iowa, 315, 126 N. W. 147.) In the case at bar the sale was not connected in any way with the accident that subsequently happened to plaintiff.

If plaintiff has a cause of action for his injuries, it must be founded on the fact that the accident by which he was injured might reasonably have been anticipated by defendant as a consequence of the sale of the firecrackers to him. There is no evidence showing that such injury ought to have been anticipated as a consequence of the sale. The evidence shows that plaintiff was familiar and experienced in the handling of firecrackers. It cannot be said that defendant might reasonably have anticipated that an accident would occur from the handling of the firecrackers from the fact alone that the person to whom defendant sold them was a minor. (*Poland* v. *Earhart*, *supra*; *Stephenson* v. *Corder*, 71 Kan. 475, 114 Am. St. Rep. 500, 69 L. R. A. 246, 80 Pac. 938; *Carter* v. *Towne*, 103 Mass. 507; Thompson on Negligence, 2d ed., sec. 830; *Reino* v. *Montana Mineral Land etc. Co.*, 38 Mont. 291, at page 295, 99 Pac. 853; note to *Kreigh* v. *Westinghouse C. K. & Co.*, 11 L. R. A. (n. s.) 684; *Gartin* v. *Meredith*, 153 Ind. 16, 53 N. E. 936; *McKibbin* v. *F. E. Bax & Co.*, 79 Neb. 577, 126 Am. St. Rep. 677, 13 L. R. A. (n. s.) 646, 113 N. W. 158.)

[60 Mont. 8.]

Where the complaint shows that damages resulted from plaintiff's own act, the burden is upon him to show that he is not guilty of contributory negligence. (*Snook* v. *City of Anaconda*, 26 Mont. 128, 66 Pac. 756; *Kennon* v. *Gilmer*, 4 Mont. 433, 2 Pac. 21; *Meehan* v. *Great Northern Ry. Co.*, 43 Mont. 72, 114 Pac. 781; *Harrington* v. *Butte etc. Ry. Co.*, 37 Mont. 169, 16 L. R. A. (n. s.) 395, 95 Pac. 8.) This plaintiff has not done.

Plaintiff was in *pari delicto* with defendant, and therefore cannot recover. (*Kallio* v. *Northwestern Improvement Co.*, 47 Mont. 314, Ann. Cas. 1915A, 1228, 132 Pac. 419; *Melville* v. *Butte-Balaklava Copper Co.*, 47 Mont. 1, 130 Pac. 441; 1 Thompson on Negligence, sec. 83; 29 Cyc. 501; *Little* v. *Southern Ry. Co.*, 120 Ga. 347, 102 Am. St. Rep. 104, 66 L. R. A. 509, 47 S. E. 953.) This rule applies to minors, even if of tender years (*Barney* v. *Hannibal & St. Joseph R. Co.*, 126 Mo. 372, 26 L. R. A. 847, 28 S. W. 1069).

Mr. William Meyer, for Respondent, submitted a brief and argued the cause orally.

Counsel contend that it was the illegal act of plaintiff which resulted in his injuries, and that therefore he cannot recover. In support of this contention he cites the cases of: *Kallio* v. *Northwestern Imp. Co.*, 47 Mont. 314, Ann. Cas. 1915A, 1228, 132 Pac. 419, and *Melville* v. *Butte Balaklava Copper Co.*, 47 Mont. 1, 130 Pac. 441. These cases, however, are not in point; in neither of these cases was the plaintiff or plaintiff's intestate, a minor. If the respondent hercin was not a minor, then the language of the court in the *Melville case* might apply, but we submit that the age of respondent, as disclosed by the evidence, makes the question of contributory negligence, if at all available to appellant in in this case, a question of fact for the jury. In the case of *Mason* v. *Northern Pacific Ry. Co.*, 45 Mont. 474, 124 Pac. 271, this court held the correct rule to be in this state that a child was bound to exercise only the care of those of his

own age and understanding, and held that whether such care had been exercised in the given case was a question of fact for the jury. (*Conway* v. *Monidah Trust Co.*, 47 Mont. 269, L. R. A. 1915E, 500, 132 Pac. 26.) In the *Mason Case*, we call the court's attention to the fact that the minor there was sixteen years of age. Under the above decisions, we submit that it must be held that the question of contributory negligence in this case was a question for the jury. (*Northern Pacific R. Co.* v. *Chervenak*, 203 Fed. 884, 122 C. C. A. 178 (five years); *Texas & N. O. R. Co.* v. *McLeod*, 62 Tex. Civ. 270, 131 S. W. 311 (fourteen years); *Trent* v. *Norfolk & W. R. Co.*, 167 Ky. 319, 180 S. W. 792 (eight years); *Gesas* v. *Oregon Short Line R. Co.*, 33 Utah, 156, 13 L. R. A. (n. s.) 1074, 93 Pac. 274 (eight years); *Cahill* v. *E. B. & A. L. Stone & Co.*, 153 Cal. 571, 19 L. R. A. (n. s.) 1094, 96 Pac. 84; *Hammond, W. & E. C. Electric St. R. Co.* v. *Blockie*, 40 Ind. App. 497, 82 N. E. 541; *Denver City Tramway Co.* v. *Nicholas*, 35 Colo. 462, 84 Pac. 813; *St. Louis & S. F. R. Co.* v. *Hodge*, 53 Okl. 427, 157 Pac. 60; *Lodge* v. *Pittsburgh & L. E. Ry. Co.*, 243 Pa. St. 10, 89 Atl. 790 (eleven years).)

It is our contention that the appellant in this case was liable for two reasons: First: His violation of the ordinances of the city of Butte, and, second, his negligence in selling firecrackers to a minor. (See *Akin* v. *Bradley Engineering & M. Co.*, 48 Wash. 97, 92 Pac. 903; *Harriman* v. *Pittsburgh etc. Ry. Co.*, 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451; *Wells* v. *Gallagher*, 144 Ala. 363, 113 Am. St. Rep. 50, 3 L. R. A. (n. s.) 759, 39 South. 747; *Mattson* v. *Minnesota etc. R. Co.*, 95 Minn. 477, 111 Am. St. Rep. 483, 70 L. R. A. 503, 104 N. W. 443; *Vills* v. *City of Cloquet*, 119 Minn. 277, 138 N. W. 33; *Loughlin* v. *Pennsylvania R. Co.*, 240 Pa. St. 174, 87 Atl. 294; *Mathis* v. *Granger Brick & Tile Company*, 85 Wash. 634, 149 Pac. 3.)

The fact that the ordinance in question also makes it unlawful to discharge fireworks does not bar the action, but only goes to the question of contributory negligence. (1 Thomp-

son on Negligence, sec. 210.) "If one sells gunpowder or other explosives to children, or to others whom he knows to be incapable of taking proper care of them, he is liable for injuries resulting from their improper use by such persons." (19 Cyc. 7.)

That the sale of the fireworks to respondent was the proximate cause of the injury, see *Holter Hardware Co.* v. *Western Mortgage & W. T. Co.*, 51 Mont. 94, L. R. A. 1915F, 835, 149 Pac. 489, 490; *Mathis* v. *Granger Brick & Tile Co.*, 85 Wash. 634, 149 Pac. 3; *Missouri O. & G. R. Co.* v. *Miller*, 45 Okl. 173, 145 Pac. 367; *McAuley* v. *Casualty Co. of America*, 39 Mont. 185, 102 Pac. 586, 589; *Clark* v. *E. I. Dupont etc. Powder Co.*, 94 Kan. 268, Ann. Cas. 1917B, 340, L. R. A. 1915E, 479, 146 Pac. 320.

We call the court's attention to three cases which we believe to be so closely parallel to the case at bar, both as to the law and the facts, that in our opinion they should be adopted as the law in this case. We refer to the cases of *McEldon* v. *Drew*, 138 Iowa, 390, 128 Am. St. Rep. 203, 116 N. W. 147; *Pizzo* v. *Wiemann*, 149 Wis. 235, Ann. Cas. 1913C, 803, 38 L. R. A. (n. s.) 678, 134 N. W. 899; *Olson* v. *Gill Home Inv. Co.*, 58 Wash. 151, 27 L. R. A. (n. s.) 884, 108 Pac. 140.

MR. JUSTICE GALEN delivered the opinion of the court.

The amended complaint in this action, after alleging that the plaintiff is a minor, ten years of age, and the appointment of W. M. Jackson as his guardian *ad litem*, alleges: "That a long time prior to the ninth day of July, 1916, to-wit, on or about the twenty-second day of September, 1910, the city council of the city of Butte duly passed, and the then mayor did approve an ordinance, being Ordinance No. 948 of the series of ordinances of the city of Butte, which said ordinance was entitled: 'An ordinance prohibiting the discharge of fireworks and other pyrotechnic display[s] and to prohibit the sale thereof.' Which said ordinance was in

full force and effect on the ninth day of July, 1916, and at all the times herein mentioned, and where and whereby it was provided amongst other matters, as follows: 'Section 2. The sale of fireworks at retail is prohibited.' And that said ordinance has not been amended or repealed."

It is further alleged that the defendant was engaged in the general mercantile business within the corporate limits of the city of Butte, and that "on the ninth day of July, 1916, the said defendant unlawfully, recklessly, carelessly and negligently did sell to the above-named Elmer Jackson, and in violation of the provisions of Ordinance No. 948 of the ordinances of the city of Butte, one package of firecrackers." It is alleged that Elmer Jackson "did not know, and in the exercise of ordinary care could not have known, that the amount of powder contained in said firecracker was sufficient so that when the same was exploded, it would be liable, if held in the hand," to cause injury to the plaintiff's hand, and that the defendant failed to warn the plaintiff "of the quantity of powder contained in each of said firecrackers or the probable effect of the explosion" thereof, and that the plaintiff "did not know, and in the exercise of ordinary care could not have known," of the danger. It is then alleged that, while held by the plaintiff, one of the firecrackers exploded and caused injuries to plaintiff's left hand, necessitating partial amputation of the left thumb and the tip of the index finger; and further, that it was dangerous to sell firecrackers to children and was dangerous and unsafe to sell firecrackers to the plaintiff, and that the defendant knew, or by the exercise of ordinary care should have known, of the danger. It is then alleged that by reason of the injuries sustained to the plaintiff's left hand it has become deformed and that his earning capacity is greatly diminished and impaired, and the injuries by him sustained permanent. Damages are alleged in the sum of $5,000.

The answer admits that plaintiff is a minor twelve years of age, and the appointment of W. M. Jackson as his guard-

ian *ad litem*. The existence of Ordinance No. 948 of the city of Butte and the sale by the defendant to the plaintiff of one package of firecrackers are admitted and each other allegation of the complaint is denied; and by way of affirmative defense, the answer pleads contributory negligence and that the sole cause of the accident was the illegal act of the plaintiff in discharging the firecracker within the corporate limits of the city of Butte in violation of the ordinance, which provides, in addition to the provisions thereof alleged in plaintiff's amended complaint, as follows: "The discharge, firing or use of all firecrackers, rockets, torpedoes, Roman candles, or other fireworks or substances designated for pyrotechnic display, and of all pistols, canes, cannons, or other appliances using blank cartridges or caps containing chlorate of potash mixture, is hereby prohibited."

The plaintiff's reply admits that the plaintiff is twelve years of age and the existence of the provision in the ordinance as alleged by the defendant, and all other allegations of the answer are denied.

A trial to the court and jury was had, which resulted in a verdict in favor of the plaintiff for the sum of $1,200, and judgment was regularly entered thereon. This appeal is from the judgment and order denying defendant's motion for a new trial.

Eight specifications of error are assigned, involving the decision of but a single question determinative of the case, *viz.*: Did the defendant render himself liable, under the circumstances of this case, by making sale of the firecrackers in violation of the city ordinance?

No objection was made to the sufficiency of the pleadings and there is but little conflict in the evidence. There is no dispute with reference to the fact that the city ordinance was violated by both the plaintiff and the defendant, *i. e.*, (1) by the defendant in unlawfully making sale of the firecrackers, and (2) by the plaintiff in discharging the same within the corporate limits of Butte.

[60 Mont. 8.]

Notwithstanding the youth of the plaintiff, he is chargeable [1] equally with the defendant with the obligation of refraining from violation of penal statutes or ordinances. And where the parties are *in pari delicto*, a recovery may not be had by the plaintiff for his own misconduct. Section 6192, Revised Codes, provides: "Between those who are equally in the right or equally in the wrong, the law does not interpose." (See, also, *Melville* v. *Butte-Balaklava Copper Co.*, 47 Mont. 1, 130 Pac. 441, and *Kallio* v. *Northwestern Improvement Co.*, 47 Mont. 314, Ann. Cas. 1915A, 1228, 132 Pac. 419.) The leading case applying the principle involved is that of *Butterfield* v. *Forrester*, 11 East, 61, 103 Eng. Reprint 927, wherein Lord Ellenborough, C. J., said: "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right." That was an action on the case for obstructing a highway by means of which the plaintiff, who was riding along the road at excessive speed, was thrown down with his horse and injured.

It is the general rule that the violation of a penal statute [2] or ordinance by one resulting in injury to another is negligence *per se*. (*Watts* v. *Montgomery T. Co.*, 175 Ala. 102, 105 South. 471; Thompson's Commentaries on the Law of Negligence, sec. 10; *Osterholm* v. *Boston & Mont. C. & S. Min. Co.*, 40 Mont. 508, 107 Pac. 499; *Neary* v. *Northern Pac. Ry. Co.*, 41 Mont. 480, 110 Pac. 226; *Melville* v. *Butte-Balaklava Copper Co.*, *supra*.) But this rule fails of application where the parties are *in pari delicto*. (*Melville* v. *Butte-Balaklava Copper Co.*, *supra*; Thompson's Commentaries on the Law of Negligence, sec. 204; *Kallio* v. *Northwestern Improvement Co.*, *supra*.)

We think the rule laid down by Mr. Chief Justice Brantly, [3] speaking for this court, in the case of *Melville* v. *Butte-Balaklava Copper Co.*, *supra*, conclusive. It is there held: "If a violation of the statute by the employer is negligence,

it is equally so on the part of the employee; and if the disobedience on the one hand is the proximate cause of the injury, so the dereliction, on the other hand, must be regarded as a contributing proximate cause; for the disobedience is concurrent, and the injury is the result of the concurrent causes which operated to the same end. In such a case, the employee cannot recover, because, in alleging the injury, he must, of necessity, allege his own fault. It is a general rule that an action never lies when the plaintiff must base his claim, in whole or in part, on the violation of a criminal or penal law of the state (*Lloyd* v. *North Carolina R. R. Co.*, 151 N. C. 536, 45 L. R. A. (n. s.) 378, 66 S. E. 604; *Nottage* v. *Sawmill Phoenix* (C. C.), 133 Fed. 979; *McGrath* v. *Merwin*, 112 Mass. 467, 17 Am. Rep. 119; *Louisville etc. Ry. Co.* v. *Buck*, 116 Ind. 566, 9 Am. St. Rep. 883, 2 L. R. A. 520, 19 N. E. 453; *Little* v. *Southern Ry. Co.*, 120 Ga. 347, 102 Am. St. Rep. 104, 66 L. R. A. 509, 47 S. E. 953; *Voshefskey* v. *Hillside Coal & I. Co.*, 21 App. Div. 168, 47 N. Y. Supp. 386; Thompson's Commentaries on the Law of Negligence, secs. 10, 204, 249)."

While the plaintiff bases his claim for damages upon a violation of the city ordinances by the defendant, yet from the pleadings as well as the evidence introduced at the trial, it appears that plaintiff's claim of damages is attributable to his own violation of such ordinances, and therefore he is not entitled to recover.

It is not necessary for decision in this case to determine the question of the proximate cause of the injury, either as a matter of law or of fact, further than to say, if the plaintiff had not lighted the firecracker and discharged it in violation of the ordinance, he would not have been injured thereby.

The fact alone that the act of the defendant was in violation of the ordinance does not afford ground for the recovery of damages for the injury complained of, unless it shall, in addition, be affirmatively made to appear (1) that the plaintiff was free from fault, and (2) that defendant's act was

the proximate cause of the injury. Neither party having obeyed the city ordinance, and the accident being due to such nonobservance, they are *in pari delicto* and the plaintiff is not entitled to recover. The law leaves them where it finds them, equally in the wrong, although injury resulted to the plaintiff from their combined wrongs.

For the reasons stated, the judgment and order appealed from are reversed, with directions to the district court to enter judgment in favor of the defendant.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, COOPER and HOLLOWAY concur.

Rehearing denied May 31, 1921.

ZANOS, RESPONDENT, *v.* GREAT NORTHERN RY. CO., APPELLANT.

(No. 4,356.)

(Submitted April 19, 1921. Decided May 9, 1921.)

[198 Pac. 138.]

Personal Injuries—Master and Servant—"Negligence"—Evidence — Admissibility — Instructions — Quotient Verdicts — New Trial.

Personal Injuries—Master and Servant—Quotient Verdict—New Trial.

1. Where the jurors in a personal injury action agreed among themselves that in arriving at a verdict each of them should write the amount he deemed plaintiff entitled to upon a slip of paper, the several amounts to be added by one of their number, acting as clerk, and the sum total divided by twelve, the amount thus arrived at to stand as their verdict, the result was a quotient verdict entitling defendant to a new trial.

---

1. Validity of chance or quotient verdicts, see notes in 16 Ann. Cas. 910; Ann. Cas. 1917C, 1224.

[60 Mont. 17.]

Same—"Negligence"—Definition.

2. Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such person under the existing circumstances would not have done.

Trial—Instructions—Review—Technical Niceties.

3. In reviewing instructions given to the jury substance should not be sacrificed to undue nicety in phraseology or too critical exactness in the use of words.

Same—Instructions Deemed Deficient—Duty of Appellant.

4. Where an instruction in appropriate language calls the attention of the jury to the subject matter to be considered and fairly states and presents the questions to be determined, it is sufficient, and if in such a case a more specific instruction is required by a party, it is his duty to tender one or a modification of the one given, a demand that the court do so being insufficient.

Personal Injuries—Impairment of Earning Capacity—Faulty Instruction.

5. An instruction that if the evidence made it appear that plaintiff's earning capacity had been impaired by reason of his injuries, the jury should compensate him for such impairment, without stating a rule or guide for arriving at the amount to be awarded in that behalf, was faulty.

Same—Evidence—Admissibility Under Pleadings.

6. Under the allegation of the complaint, after more minutely describing plaintiff's injuries, that his body had been "otherwise injured," evidence that he had sustained a rupture was admissible, over the objection that such injury was not within the pleadings.

Appeals from District Court, Silver Bow County; J. J. Lynch, Judge.

ACTION by Socrates Zanos against the Great Northern Railway Company. From a judgment for plaintiff and an order denying its motion for a new trial, defendant appeals. Reversed.

Messrs. Veazey & Veazey and *Mr. H. C. Hopkins*, for Appellant, submitted an original and a supplemental brief; *Mr. I. Parker Veazey, Jr.*, argued the cause orally.

Messrs. Maury & Melzner and *Mr. John Georgiades*, for Respondent, submitted a brief.

MR. CHIEF COMMISSIONER POORMAN prepared the opinion for the court.

This is an appeal by defendant from an order overruling its motion for a new trial, and also from a judgment entered

against it on a verdict for plaintiff, in an action for damages resulting from personal injuries alleged to have been sustained by plaintiff, then an employee of defendant company, and caused by the alleged negligence of other employees of defendant.

So far as material to the questions here considered, the facts alleged are to the effect that the plaintiff and other employees of defendant were going to their work upon a roadbed of defendant company upon a hand-car, provided for that purpose by the defendant, when they were overtaken by a gasoline car under the control, management and operation of the section foreman, conveying other employees engaged in the same kind of work, to the place of labor. It is alleged that the gasoline car violently collided with the hand-car; that plaintiff was thrown off across the rails, both cars passing over him, "striking and injuring the plaintiff's back all the way up near the spinal column and thereby mashing the plaintiff's chest down against the rail, so that they broke plaintiff's bottom ribs on the right side and mangling and injuring said plaintiff's stomach and back and liver, and mashing plaintiff's knee against the rail and otherwise injuring the body of this plaintiff," and it is alleged that all this was caused by the negligence of the defendant and its servant.

The specification of errors contains the assignment that [1] "the verdict returned was a quotient verdict." In support of its motion for a new trial, the appellant filed in the district court the affidavits of six of the jurors as to the method pursued in reaching the verdict. Their affidavits are lengthy, are substantially the same in form, and do not vary materially in substance. The juror J. J. Connolly, in his affidavit, states that after the case was submitted to the jury, he was selected as the foreman thereof; that the jury first determined by a vote that a verdict for damages in some amount should be returned for the plaintiff. Juror William Molthen then suggested that in arriving at the amount of the

verdict, each of the jurors should vote the amount of damages which he thought plaintiff entitled to; that a clerk be appointed to take down the amounts so voted by the twelve jurors, and that the sums so voted should by the clerk be added together and the total divided by twelve and the quotient so obtained should be written into the form of the verdict by the plaintiff, and that the same should be returned into court as the verdict of the jury in the case. This arrangement was agreed to by all of the jurors and Molthen was selected as the clerk. The amounts were then written by the several jurors, the clerk added the same and reached the total sum of $42,000. This sum was divided by twelve and the quotient $3,500 was then written in the form of the verdict, which was signed by the foreman, and the same was returned as the verdict of the jury; that no other proceedings were had or vote taken on the part of the jury in the adoption of this verdict, and the affiant voted for a much smaller sum than he believed the plaintiff entitled to for the reason that he believed the other jurors would vote for very high amounts and he desired to keep the amount to be arrived at as low as possible.

Jurors William J. Day, William Molthen, Carl Sternberg, Thomas McFadden and Jacob Baker made similar affidavits. Subsequently, the juror William Molthen made and filed another affidavit, in which it is stated that after the sum total of the amounts voted by the jurors was divided by twelve, the quotient was not $3,500, "but a larger amount, which affiant does not remember, and thereupon and after such quotient was obtained, the said jurors refused to accept the same as their verdict as being an amount too high in proportion to the damages sustained by plaintiff and that all of the jurors then and there agreed not to abide by such result, and did not abide by such result but they and each of them agreed that the sum of $3,500 would be a proper and sufficient verdict, and after said verdict was agreed upon as aforesaid, J. J. Connolly, foreman of the jury, wrote in the

form of verdict for the plaintiff the sum of $3,500, which said verdict was duly returned into the court." Affiant further states that the verdict was arrived at in the manner stated in this subsequent affidavit, and not otherwise.

This subsequent affidavit does not deny that the agreement was made, as stated in the former affidavits, nor does it deny that the sum total was $42,000, but denies that the quotient obtained was $3,500. If the sum total was $42,000, and the divisor was twelve, and the quotient arrived at was any other sum than $3,500, the error was in the division. But even if his subsequent affidavit had been contradictory in all respects of the former affidavits, it would still remain as five against one, and the other affiants and also this affiant Molthen stated that in their votes they had named a sum smaller than they believed plaintiff entitled to—in other words, that they were acting under the influence of the preagreement and prearrangement at the time they voted on the amount.

That this is what is called a "quotient verdict" is clearly sustained by the facts presented, and that it cannot be sustained is also apparent. Comment is unnecessary; the whole proposition is thoroughly discussed and clearly analyzed by the former decisions of this court and by other courts. (*Gordon* v. *Trevarthan,* 13 Mont. 387, 40 Am. St. Rep. 452; 34 Pac. 185; *Great Northern Ry. Co.* v. *Benjamin,* 51 Mont. 167, 149 Pac. 968; *Wright* v. *Union Pac. Ry. Co.,* 22 Utah, 338, 62 Pac. 317; *International Agr. Corp.* v. *Abercrombie,* 184 Ala. 244, 49 L. R. A. (n. s.) 415, 63 South. 549; *Texas Midland R. R. Co.* v. *Atherton* (Tex. Civ.), 123 S. W. 704; *Whisenant* v. *Schawe* (Tex. Civ.), 141 S. W. 146; *City of Ottawa* v. *Gilliland,* 63 Kan. 165, 88 Am. St. Rep. 232, 65 Pac. 252. *Harrington* v. *Butte, Anaconda & Pac. Ry. Co.,* 36 Mont. 478, 93 Pac. 640, may also be referred to.)

At the trial, the plaintiff tendered an instruction defining "negligence." The court modified the instruction and gave [2] it as so modified. The definition of "negligence" heretofore approved by this court is: "Negligence is the failure to do

what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done." (*Birsch* v. *Citizens' Elec. Co.*, 36 Mont. 574, 93 Pac. 940.) Neither the instruction offered nor the one given complies strictly with this definition. The offered instruction contains both the words "average" and "ordinarily." The instruction given, contains neither of these terms. The definition adopted by the court contains the word "ordinarily" but not the word "average," but the instruction of the court given as "5–A" is substantially correct. Substance cannot [3] be sacrificed to undue nicety in phraseology and too great critical exactness in the use of words.

Appellant also objects to court's instruction No. 3 and very strongly contends that the instruction is erroneous [4] in several particulars. It may be stated as a general rule that where an instruction, in appropriate language, calls the attention of the jury to the subject matter to be considered and fairly states and presents the questions to be determined, it is sufficient. Section 6746, Revised Codes, does not require more than this of the court's own motion. If, in such a case, a more specific instruction than that given is desired by a party, it is his duty to tender one, or to tender a modification of the one given. It is not sufficient merely to demand that the court do it. This instruction meets with these requirements and no other was offered. So far as the trial of this case was concerned, this instruction was not erroneous. However, if an instruction, correct in other matters and more complete in the particulars here referred to, had been tendered, it would have been the duty of the court to [5] give it. The instruction contains this statement: "If you find from the evidence that his capacity to earn money in the future is certain to be impaired by reason of his injuries, if any, you should compensate him for such impairment." This statement is authorized by section 6068, Revised Codes, but in the instruction, no rule or guide or suggestion was

made to the jury as to how it was to comply with this requirement. This matter was once before this court and has been quite recently thoroughly discussed, analyzed and determined by other courts, and we go no farther here than to call attention to those decisions: *Bourke* v. *Butte Elec. & Power Co.*, 33 Mont. 267, 289, 83 Pac. 470; *Chesapeake & Ohio Ry. Co.* v. *Kelly*, 241 U. S. 485, 60 L. Ed. 1117, 36 Sup. Ct. Rep. 630 [see, also, Rose's U. S. Notes]; *Kinney* v. *Folkerts*, 84 Mich. 616, 48 N. W. 283; s. c., 78 Mich. 687, 44 N. W. 152; *Secord* v. *John Schroeder Lbr. Co.*, 160 Wis. 1, 150 N. W. 971.

At the trial the plaintiff was permitted to introduce [6] evidence relative to a rupture, as a part of the injuries sustained by him. The defendant at that time contended that the evidence was improper because this particular injury was not within the pleadings. This question may arise on a new trial of this cause. No objection was made to the complaint on the ground that it was not sufficiently specific. We believe that the allegations of the complaint are broad enough to admit this evidence. (*Jenkins* v. *Northern Pac. Ry. Co.*, 44 Mont. 295, 304, 119 Pac. 794.)

Because of the error committed by the jury in the method of arriving at the verdict, we recommend that the judgment of the district court, and also the order overruling appellant's motion for a new trial, be reversed and the cause remanded for a new trial.

PER CURIAM: For the reasons given in the foregoing opinion, the judgment and order overruling the motion for a new trial are reversed and the cause is remanded for a new trial.

Reversed and remanded.

NEWTON, RESPONDENT, *v.* CITY OF ROUNDUP, APPELLANT.

(No. 4,363.)

(Submitted April 19, 1921. Decided May 9, 1921.)

[198 Pac. 441.]

Cities and Towns—Nuisances — Septic Tanks — Improper Operation—Complaint—Evidence — Improper Admission — Curing Error—Excessive Verdict.

Nuisances—Cities and Towns—Septic Tanks—Improper Operation—Complaint—Sufficiency.

1. In an action to abate a nuisance and to recover damages, the complaint, which in substance alleged that by the negligent operation of a septic tank in connection with defendant city's sewer system near his premises, in dumping the excrement therefrom upon a gravel-bar, polluting the atmosphere as well as the water used by plaintiff for domestic and business purposes, to such an extent as to render his dwelling-house unfit for habitation, *etc.*, *held* to state a cause of action.

Same—Evidence—Sufficiency.

2. Evidence showing that the air over the portion of plaintiff's premises on which his dwelling-house and other improvements were situated was polluted by noxious odors emanating from the material removed from the septic tank and deposited about 150 yards from his premises was sufficient to show negligent operation of the tank and the existence of a nuisance.

Evidence—Improper Admission—Cautionary Instruction—Curing Error.

3. Error in the admission in evidence of immaterial and incompetent matters was cured by an instruction taking from the jury any consideration thereof, the presumption obtaining that they followed the instruction.

Nuisances—Excessive Verdict.

4. A verdict for $2,000 in an action for damages for maintaining a nuisance, where it appeared that besides losing $15 rental a month of a house and garden for about a year, plaintiff lost the use of a quarter-section of land with improvements thereon, and suffered discomfort and annoyance for practically two years, *held* not excessive, it being impossible in such a case to lay down a fixed measure of damages.

Appeals from District Court, Musselshell County; Charles L. Crum, Judge.

Matters affecting health or comfort as public nuisances, see note in 107 **Am. St. Rep.** 236.

Deposit of garbage by municipality as nuisance, see note in **Ann. Cas. 1915A, 139.**

[60 Mont. 24.]

ACTION by J. W. Newton against the City of Roundup. From a judgment for plaintiff, and from an order overruling its motion for a new trial, defendant appeals. Affirmed.

Mr. Thomas J. Matthews, for Appellant, submitted a brief.

The complaint is insufficient. Sections 3882 and 3283, Revised Codes, provide in substance that all claims against the city (and particularly those where the amount and character of the claim may be ascertained with reasonable certainty) should be itemized and verified and presented to the city council, and the council given an opportunity to pass on the claim, and if it is found to be a just claim, to pay the same; and the statute provides that no action shall be maintained against the city on account of such claim or demand until the claim or demand has first been presented to the city council for action thereon. This constitutes a condition precedent to the right to maintain an action on the claim in this action, and should have been pleaded by the respondent, if proper action had been taken by him, and if not, then the suit was not maintainable, until the statute had been complied with.

One reason why the damages placed at $2,000 are grossly excessive is that the respondent, over the objection of the appellant, was allowed to testify to a number of particular and itemized items of special damages, to-wit: $280 for a well; $180 for casing; and $725 for an engine, which were not pleaded, and timely objection was made on that account by the appellant. These damages were clearly special damages, which may have been the natural, but were not the necessary, results of the injury complained of, and, therefore, must have been specially pleaded. (5 Ency. Pl. & Pr. 719, and cases cited; also *Parker* v. *Bond,* 5 Mont. 1, 11, 1 Pac. 209; *Mallory* v. *Thomas,* 98 Cal. 644, 647, 33 Pac. 757; *McDuff* v. *Detroit Evening Journal Co.,* 84 Mich. 1, 22 Am. St. Rep. 673, 47 N. W. 671; *Spencer* v. *St. Paul etc. R. Co.,* 21 Minn. 362; *Gumb* v. *Twenty-third Street R. Co.,* 114 N. Y. 411, 414, 21 N. E. 993; *Wisner* v. *Barber,* 10

Or. 342, 344; *Roberts* v. *Graham*, 6 Wall. (U. S.) 578, 18 L. Ed. 791 [see, also, Rose's U. S. Notes].)

Messrs. Maris & Mercer and *Messrs. Goddard & Clark*, for Respondent, submitted a brief; *Mr. O. F. Goddard* argued the cause orally.

That the allegations of the complaint are sufficient to charge the negligence of the defendant is shown by the following cases: *Louisville etc. R. Co.* v. *Lynch*, 147 Ind. 165, 34 L. R. A. 293, 44 N. E. 997, 46 N. E. 471; *Louisville etc. R. Co.* v. *Shearer*, 119 Ky. 648, 59 S. W. 330; *Shepherd* v. *Morton-Edgar Lumber Co.*, 115 Wis. 522, 92 N. W. 260; *International etc. R. Co.* v. *Glover* (Tex. Civ.), 88 S. W. 515; *Forquer* v. *North*, 42 Mont. 272, 273, 112 Pac. 439; *Pullen* v. *City of Butte*, 38 Mont. 194, 195, 21 L. R. A. (n. s.) 42, 99 Pac. 290; *Storm* v. *City of Butte*, 35 Mont. 385, 89 Pac. 726.

Even though municipalities are clothed with power to construct sewer systems, septic tanks and other public works, such a municipality cannot in the use of such power create a nuisance to the damage of a private individual without responding in damages whether the nuisance is the result of negligence or otherwise. (*Markwardt* v. *City of Guthrie*, 18 Okl. 32, 11 Ann. Cas. 581, 9 L. R. A. (n. s.) 1150, 90 Pac. 26; *Peterson* v. *City of Santa Rosa*, 119 Cal. 387, 51 Pac. 557; *People* v. *City of San Luis Obispo*, 116 Cal. 617, 48 Pac. 723; *Robb* v. *La Grange*, 158 Ill. 21, 42 N. E. 77; *Winchell* v. *Waukesha*, 110 Wis. 101, 84 Am. St. Rep. 902, 85 N. W. 668.)

We submit that $2,000 is a very moderate amount for the injury suffered by the plaintiff because of the nuisance. In respect to discomfort and annoyance suffered, we submit the following cases: *Pierce* v. *Wagner*, 29 Minn. 355, 13 N. W. 170; *Anderson* v. *Chicago, M. & St. P. R. Co.*, 85 Minn. 337, 88 N. W. 1001; *Stetson* v. *Faxon*, 19 Pick. (Mass.) 147, 31 Am. Dec. 123; *Swift* v. *Broyles*, 115 Ga. 885, 58 L. R. A. 390,

42 S. E. 277; *Randolf* v. *Bloomfield*, 77 Iowa, 50, 14 Am. St. Rep. 268, 41 N. W. 562; *Louisville etc. Terminal Co.* v. *Jacobs*, 109 Tenn. 727, 61 L. R. A. 188, 72 S. W. 954.

MR. COMMISSIONER JACKSON prepared the opinion for the court.

In this case J. W. Newton brought his action against the city of Roundup, alleging in substance as follows: That [1] he owned certain lands in the county of Musselshell, through which lands flows the Musselshell River; that he had improved the west portion of the said lands by erecting a dwelling, slaughter-house, houses for domestic animals, fencing some of the land hog-tight, dug a well, had purchased machinery for the purpose of running an artificial ice plant and fish-pond, and had begun the erection of an ice-house thereon; that he had for many years used the waters and underflow of the Musselshell River for stock and domestic purposes, and that he has that right to so use it and likewise to use it for the purpose of making artificial ice and running a fish-pond on his premises in an unpolluted condition; that he has the right to the use of the air over his premises in a pure and unpolluted condition; that the proximity of his land to the city of Roundup contributes to its value; that he has the right to the free and unobstructed use of a certain public highway leading from the city of Roundup to his premises, and that he is obliged to make from two to six trips per day over the highway in attending to his business, and that it is the only road leading from his premises to the city; that defendant, knowing these facts, built a sewer system, completed about October 8, 1915, and in the system constructed a septic tank about fifty yards west of plaintiff's property; that the excrement and sewage of the city was conducted by the sewer system into the tank and thence to a gravel-bar in the Musselshell River, about one hundred and fifty yards southwest of plaintiff's improved property; that the septic tank is so unlawfully, negligently, improperly and

unskillfully constructed and the excrement is so unlawfully, negligently and improperly dumped on the gravel-bar, and by means of these several acts and things defendant caused noxious odors and smells and polluted and contaminated the atmosphere over the public road and the lands containing the dwelling, slaughter-house and other improvements, and polluted and contaminated the water of the said Musselshell River and the underflow thereof, so as to render the dwelling-house unfit for habitation, and to render the lots, houses for domestic animals and other improvements on the lands unfit for the use of the plaintiff, and also prevented the plaintiff from renting the same, or otherwise receiving any income therefrom, and that travel on the said public highway was made very offensive and disagreeable. The abatement of the nuisance is asked and $10,000 damages. The general and special demurrers to the complaint were overruled and the defendant answered in effect by a general denial of the nuisance and damages, setting up as an affirmative defense that prior to the construction of the sewer and septic tank, the plaintiff had erected a slaughter-house in proximity to the septic tank, with the usual slaughter-house appurtenances, and that through plaintiff's neglect, large amounts of decayed animal matter were deposited around the premises, and that there arose therefrom noxious gases and smells which poiluted the surrounding atmosphere and made the road travel disagreeable; that the tank was properly constructed and functioned in a sanitary and odorless fashion; that any damage done was due to the use the plaintiff made of his premises. The plaintiff traverses by reply the allegations of defendant's affirmative defense.

The trial was had before a jury and it returned special findings of fact as follows:

"1. Was the slaughter-house, mentioned in the complaint in this action, in such a condition from the time of the erection of the septic tank to the trial of this action that it complied

with the requirements of the state board of health of the state of Montana relating to slaughter-houses? Answer: No.

"2. If you find that the plaintiff has suffered any damages by reason of the acts complained of, how much of said damages was suffered by reason of plaintiff's being deprived of the use of the slaughter-house for slaughter-house purposes? Answer: None.

"3. What is the reasonable rental value per month of the house and the garden in connection therewith? Answer: $15 per month.

"4. If you find that the plaintiff has suffered damage by reason of the acts of the defendant, was such damage suffered by reason of the defective construction of the septic tank, or the failure to properly manage the same? Answer: Failure to properly manage"; and a general verdict for the plaintiff in the sum of $2,000. Defendant appeals from the judgment and order denying a new trial.

Error has been predicated in nineteen assignments, all of which will be treated under the following heads: Sufficiency of the complaint; sufficiency of plaintiff's evidence under the allegations; excessiveness of the verdict in view of the special findings and the evidence; immaterial and incompetent matters testified to at the trial tending to confuse the jury; the giving and refusing of certain instructions.

That the complaint is sufficient has been definitely settled by this court in *Dawes* v. *Great Falls*, 31 Mont. 9, 77 Pac. 309. We also think no fatal error shows in the instructions.

While plaintiff did not prove the tank was "unlawfully, [2] negligently, improperly and unskillfully constructed," the evidence overwhelmingly shows that the air over the west portion of plaintiff's land, on which was situated the house and other improvements, and the road, was polluted by the noxious odors that emanated from the material which came from the septic tank and was deposited on the gravel-bar. This proof, as we view it under the allegation, "and the excrement is so unlawfully, negligently and improperly dumped

on said gravel-bar," is sufficient to show the negligent and improper operation of the tank and the establishment of a nuisance to plaintiff. "The function of this court is to determine whether plaintiff made a case by his evidence upon which he is entitled to relief within the allegations of his complaint, considered from any point of view." (*Hamilton* v. *Hamilton*, 51 Mont. 509, 154 Pac. 717; *Forsell* v. *Pittsburgh etc. Copper Co.*, 38 Mont. 403, 100 Pac. 218.)

Practically all of plaintiff's case is devoted to the showing that the "lower 80" was the portion of plaintiff's lands, the air over which and the water thereon were subject to the detriment of the noisome smells and water pollution, with consequent unfitness for use or rental by plaintiff, and that the air over the road traveled by plaintiff in the use of his property had been vitiated. Plaintiff's evidence shows that the witness Smith was compelled to leave plaintiff's house, in which he had lived, on account of disagreeable odors, and the house had been vacant for one year at least prior to the trial; that plaintiff had not used his property without annoyance for practically two years; that he suffered no loss from his purchase of machinery; and that the nuisance was abated a short time prior to the date of this trial. The evidence of the defendant sharply conflicts with that of the plaintiff, but its weight and the credibility of the witnesses were solely within the province of the jury.

While it is true that during the course of the trial many [3] immaterial and incompetent matters were admitted in evidence that might tend to confuse the jury, we are of the opinion that the instruction of the court taking from the jury any consideration of those matters disposes of this contention, for it is to be assumed that the jury followed the court's instructions. The jury found that all of the evidence preponderated in favor of plaintiff, and while returning to the court the findings of fact, assessed the damages of the plaintiff at the sum of $2,000.

Plaintiff made his case to the satisfaction of the jury, and [4] while two findings of fact show the jury decided he had suffered no damages by reason of being deprived of the use of the slaughter-house as such, and that the rental value of the house and garden was but $15 a month, there was certainly nothing to preclude the jury from considering the discomfort and annoyance suffered by the plaintiff and the loss of the entire "lower 80" and its improvements for any purpose for which it might ordinarily be used by reason of the nuisance, and that plaintiff was damaged to the amount of the verdict. We think the damages not excessive. (*Anderson* v. *Chicago, M. & St. P. Ry. Co.*, 85 Minn. 337, 88 N. W. 1001.) The case is one where no fixed measure of damages can be laid down (*Pierce* v. *Wagner*, 29 Minn. 355, 13 N. W. 170; *Neary* v. *Northern Pac. Ry. Co.*, 41 Mont. 480, 110 Pac. 226; *Hollenback* v. *Stone & Webster Engineering Corp.*, 46 Mont. 559, 129 Pac. 1058; *Kelley* v. *John R. Daily Co.*, 56 Mont. 63, 181 Pac. 326).

For the reasons herein stated, we recommend that the judgment and order appealed from be affirmed.

PER CURIAM: For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

Affirmed.

MASON, RESPONDENT, v. SWEE, APPELLANT.

(No. 4,362.)

(Submitted April 19, 1921. Decided May 9, 1921.)

[198 Pac. 356.]

Equity—Partnership—Accounting—Findings of Jury—When Conclusive.

Equity—Conflicting Evidence—Findings—When Conclusive.

1. Where the evidence in an equity case, tried by a jury, is in substantial conflict, the burden rests upon appellant to show that its preponderance was decisively in his favor before a reversal of the judgment on the ground that the findings are not supported by the evidence may be had.

Same—Findings—Evidence—Showing Necessary for Reversal.

2. While the findings of a jury in an equity case are only advisory and may be adopted or rejected, yet where the trial court by their adoption approved them, a showing that there is a clear preponderance of the evidence against them is necessary before they will be disturbed on appeal.

Appeal from District Court, Missoula County; Asa L. Duncan, Judge.

ACTION by Dwight N. Mason against John Swee. Judgment for plaintiff. Defendant appeals from it and from an order denying him a new trial. Modified and affirmed.

Mr. Albert Besancon, Mr. E. C. Mulroney, Mr. Coker F. Rathbone and *Mr. L. I. Wallace,* for Appellant, submitted a brief; *Mr. Besancon* and *Mr. Mulroney* argued the cause orally.

Mr. A. N. Whitlock and *Mr. Harry H. Parsons,* for Respondent, submitted a brief; *Mr. Whitlock* argued the cause orally.

MR. COMMISSIONER SPENCER prepared the opinion for the court.

This action was tried in the court below upon appropriate pleadings presenting for determination primarily the issue as to whether or not a general copartnership was entered into between plaintiff and defendant, and for an accounting. By written stipulation entered into and filed at the commencement of

the trial, the parties agreed that the only questions that should be submitted to the jury were whether such partnership ever existed, when it began and terminated, and what percentage of the profits each partner was entitled to, and that, if the jury decide that a partnership as claimed by the plaintiff did so exist and final decree to that effect be entered, an accounting should be had before a referee to be agreed upon by the parties, or designated by the court. The suit was in equity before a jury in its advisory capacity. The response of the jury to the interrogatories submitted was in favor of the plaintiff. The findings of the jury were subsequently adopted by the court, conclusions of law based thereon were made, and decree entered accordingly. Motion for a new trial was made and denied. From the order of the court overruling the motion of the defendant for a new trial and from the judgment these appeals are prosecuted.

The appellant relies upon fourteen specifications of error for a reversal, but a careful examination of the record, together with the briefs of counsel, discloses no necessity for separate consideration thereof, and all will be disposed of in the discussion following.

The special interrogatories submitted to the jury and their findings thereon were:

"Interrogatory No. 1: Was there ever a copartnership existing between the plaintiff and the defendant in the business of practicing law? Answer to interrogatory No. 1: Yes.

"Interrogatory No. 2: If you answer the interrogatory No. 1 in the affirmative, state when said copartnership began. Answer to interrogatory No. 2: November, 1910.

"Interrogatory No. 3: If you answer interrogatory No. 1 in the affirmative, state when said copartnership ended, if at all. Answer to interrogatory No. 3: May 16, 1915.

"Interrogatory No. 4: If you answer interrogatory No. 1 in the affirmative, state what share or percentages of the profits

each partner was to receive. Answer to interrogatory No. 4: Fifty per cent each.''

The testimony submitted on behalf of plaintiff, if standing [1] alone, appears to be amply sufficient to sustain the foregoing findings. The evidence of the defendant, however, produces a substantial conflict upon every material issue tendered by the plaintiff. The jury found the preponderance in favor of the plaintiff. By repeated declarations of this court, the burden rests upon the appellant to show such preponderance decisively to be otherwise in order to sustain a reversal. (*Heilman* v. *Loughrin*, 57 Mont. 380, 188 Pac. 370; *Smith* v. *Hoffman*, 56 Mont. 299, 184 Pac. 842; *Roberts* v. *Oechsli*, 54 Mont. 589, 172 Pac. 1037; *Robitaille* v. *Boulet*, 53 Mont. 66, 161 Pac. 163; *Gibson* v. *Morris State Bank*, 49 Mont. 60, 140 Pac. 76; *Dean* v. *Stewart*, 49 Mont. 506, 154 Pac. 966.) The trial court and the jury hearing the evidence, seeing the witnesses and observing their demeanor and appearance upon the stand, and having before them all of the attendant circumstances, are better able to judge of the credibility and fix the weight to be given to evidence of the various witnesses than is this court, and hence, the jury having resolved the preponderance based upon a substantial conflict in competent evidence in favor of the plaintiff, and the court having approved their findings, we think their findings should not be disturbed.

It is true that the findings of a jury in an equity case are [2] only advisory and may be adopted or rejected by the trial court as its view of the evidence may dictate (*Bosanatz* v. *Ostronich*, 57 Mont. 197, 187 Pac. 1009); yet the services of a jury once being had in an equity case, they occupy largely the same position, upon principle, as if rendering their verdict in a case at law, and therefore their findings of fact upon a substantial conflict in evidence should not be rejected unless the evidence viewed as a whole clearly preponderates against such findings. (*Bosanatz* v. *Ostronich, supra.*)

[60 Mont. 32.]

The evidence in this case is voluminous, covering transactions by and between plaintiff and defendant over a period of years from 1910 to 1915. No principle of law is involved upon this appeal requiring a decision for the purpose of establishing precedent, and a review of the facts as shown by the proof would avail nothing, and could only serve to point out a sharp and substantial conflict, which pursuant to its many declarations, precludes this court from doing other than sustain the findings of the court below. (*Bosanatz* v. *Ostronich, supra; Previsich* v. *Butte Elec. Ry. Co.*, 47 Mont. 170, 131 Pac. 25; *Murphy* v. *Cooper*, 41 Mont. 72, 108 Pac. 576.) We find no error in the record to justify a reversal.

It is to be observed, however, that plaintiff testified that a full settlement of all fees between himself and defendant was had up to July 1, 1914, and he makes no claim to his testimony for any accounting prior to that date. We think the decree of the lower court should be modified so as to exclude an accounting between these parties prior to July 1, 1914, and with that modification we recommend that the judgment and order of the lower court be affirmed.

PER CURIAM: For the reason stated in the foregoing opinion, it is ordered that the decree of the lower court be modified so as to exclude an accounting between the parties prior to July 1, 1914, and, as so modified, the judgment and order of said court is affirmed.

Modified and affirmed.

MARES, APPELLANT, *v.* MARES, EXECUTRIX, ET AL., RESPONDENTS.

(No. 4,329.)

(Submitted April 13, 1921. Decided June 27, 1921.)

[199 Pac. 267.]

Partnership—Dissolution by Death—Executors and Administrators—Accounting—Appeal — Rehearing — Statutory Construction.

Partnership—Dissolution by Death—Survivor must Make Accounting to Executrix of Decedent.

1. Where the affairs of a general partnership dissolved by death were not fully settled, an action for an accounting by the surviving partner for his sole benefit, against the executrix of the decedent did not lie, in view of the provisions of section 7607, Revised Codes, which *inter alia* make it the duty of the survivor who, in contemplation of law, is in actual possession of the partnership property, to wind up its affairs, and thereupon account to the personal representative of the decedent.

Statutes—Adoption from Another State—Construction.

2. Adoption of a statute from another state carries with it the construction placed thereon by the highest court of the state from which it is adopted.

Partnership—Dissolution—Continued Existence for Purpose of Settlement of Affairs.

3. Until the affairs of a partnership, dissolved by death or any other cause, are closed, it has a limited existence for the purpose of collecting its assets, settling all accounts and making good its outstanding engagements.

ON MOTION FOR REHEARING.

Appeal—Rehearing—Limited to Original Grounds Urged.

4. On application for rehearing, the supreme court will not consider grounds for reversal not presented upon the original hearing.

Partnership—Dissolution by Death—Claims by Surviving Partner—Presentation for Allowance Necessary.

5. Where a partnership is dissolved by death, and upon liquidation of its affairs, or in course thereof, it appears that the deceased partner was indebted to the survivor in an amount over and above the partnership assets, the latter must present his claim for allowance under the provisions of section 7525, Revised Codes.

Appeal from District Court, Lewis and Clark County; W. H. Poorman, Judge.

---

2. Construction of adopted statutes, **see notes in 1 Ann. Cas.** 147; **Ann. Cas.** 1917B, 651, 660.

[60 Mont. 36.]

ACTION by Joseph Mares against Emma Mares, as executrix of the last will and testament of Frank Mares, deceased, and another. Judgment for defendants. Plaintiff appeals. Affirmed.

Mr. Henry C. Smith and *Messrs McIntire & Murphy*, for Appellant, submitted a brief; *Mr. H. G. McIntire* argued the cause orally.

The demurrer to the amended complaint was sustained on the grounds that the same does not state facts sufficient to constitute a cause of action, and that a suit for an accounting by a surviving partner against the personal representative of a deceased partner will not lie. On the argument of the present demurrer no authorities were cited by counsel for defendants save Revised Codes, sections 7603 and 7607, particular stress being laid on section 7607, and *McKay* v. *Joy*, 70 Cal. 581, 11 Pac. 832. In this latter case section 1585 of the California Code of Civil Procedure, which is practically the same as our section 7607, was given as the sole basis of the decision, reading as follows: "Section 1585 * * * gives to the surviving partner ample power to take possession of the property of the partnership and wind up its affairs. It necessarily follows that he does not need the interposition of a court of equity to aid him in doing that which he has ample authority to do himself." This, possibly would be true if the surviving partner were actually in the possession of all the partnership assets and had the absolute control of the same, but in the instant case it is shown by the allegations of the amended complaint that such possession and control were and are not in the appellant, and it follows, then, that it is impossible to see wherein that case, even if it were good law, which we deny, has any bearing on the instant case with its entirely different statement of facts. Referring to sections 7603 and 7607 of the Revised Codes, it will be at once seen that section 7603 has no bearing whatever on the instant case, and as to section 7607, there is not here presented a case of the surviving partner continuing in the

possession of the partnership, nor the settling by him of its business, nor of his duty to account, *etc.* The firm debts are all paid, but the firm assets in appellant's possession according to the amended complaint are insufficient to satisfy the amount that he is entitled to by reason of the deceased partner having drawn out more than what he was entitled to under the partnership agreement. This, of course, under the elementary rules applicable to the law of partnership entitles him to relief, and what that relief shall be, in the nature of things, and in the light of the allegations of the amended complaint, can only be ascertained after and upon an accounting. This, we submit, is the plain meaning of *Silver* v. *Eakins*, 55 Mont. 210, 175 Pac. 877. And this is the general law on the subject. (See 30 Cyc., title "Partnership," p. 684, note 4; *Marlatt* v. *Scantland*, 19 Ark. 443; *Hargis* v. *Campbell*, 14 Fla. 27; *Gaskil* v. *Adams*, 83 Mo. App. 380.)

The authorities are to the effect that upon the dissolution of a partnership an accounting of one partner against another partner can be had; and if it could have been had against Frank Mares alive, section 7604, Revised Codes, surely provides for such a suit against his executrix. It was so held in *Franklin* v. *Trickey*, 9 Ariz. 282, 11 Ann. Cas. 1105, 80 Pac. 352. (See, also, *Choate* v. *O'Neal*, 57 Ark. 299, 21 S. W. 470; *Arnold* v. *Arnold*, 90 N. Y. 580; *Reese* v. *Kinkead*, 17 Nev. 447, 30 Pac. 1087; *Shields* v. *Fuller*, 4 Wis. 102, 65 Am. Dec. 293.) In *Sweet* v. *Taylor*, 36 Hun (N. Y.), 256, it was held: "An action at law lies by one partner against the executor of a deceased copartner to recover firm assets." In *Hawkins* v. *Capron*, 17 R. I. 679, 24 Atl. 466, it was held: "Trover lies by a surviving partner to recover possession of the firm assets against the representatives of the deceased partners." (See, also, 1 Woerner on Administration, pp. 263, 297; 30 Cyc. 684, note 4.)

Now, if, as is held in some of the above cases, an action at law will lie against the personal representative of a deceased part-

ner, *a fortiori*, must an action in equity lie. But from another standpoint the action is maintainable. Repeatedly has it been decided in Montana, as elsewhere, that until an accounting has been had between partners, and a balance found, one partner cannot sue another at law. (*Boehme* v. *Fitzgerald*, 43 Mont. 228, 115 Pac. 413.)

Now it appears from the allegations of the complaint in the present case, the deceased partner and his estate have received far more than what they were entitled to; the partnership debts and affairs have been fully adjusted and paid, and there remains only the adjustment of the affairs of the partners *inter se*, with an allegation that upon such adjustment, the deceased partner, or his estate, would be largely indebted to the partnership but in an amount not ascertainable except after an accounting, to the surviving partner. To deny this accounting, whether by the executrix or by her and the heirs at law of the deceased partner, would deprive the surviving partner of all rights, in flagrant violation of the fundamental maxim, "For every wrong there is a remedy." (Rev. Codes, sec. 6191.)

Mr. C. A. Spaulding and *Mr. O. W. McConnell*, for Respondents, submitted a brief; *Mr. Spaulding* argued the cause orally.

Appellant as the surviving partner, being in possession and having full control of all of the property of the partnership, both real and personal, must account to the executrix of the deceased partner, and she cannot be compelled to account to him. The settlement and accounting of this partnership must, under our statute, come from the surviving partner. It is peculiarly within his power to account, and it is not within the power of the executrix, or the widow or minor child of the deceased to account, and there are no allegations in the amended complaint sufficient to require an accounting by them. In the case of *McKay* v. *Joy*, 70 Cal. 581, 11 Pac. 832, it is held that a surviving partner cannot maintain an action against the personal representative of his deceased partner for an accounting

of the partnership affairs. Counsel for appellant insist that this decision is not good law, and that, even if sound in principle, it is distinguishable from the case at bar, because the amended complaint avers that the surviving partner has not possession of the partnership assets. Even if this were the allegation, which is not the case, it would constitute no valid ground of distinction. The supreme court of California directly so held in the *McKay Case*. There a surviving partner sued the administrator of the estate of the deceased partner for an accounting, averring that all the partnership assets had been seized by such administrator and that none thereof were in his possession. The court held that the action could not be maintained, and that the trial court properly granted a motion for nonsuit. The court further held that it was the duty of the surviving partner to take possession of the partnership property regardless of the claims of other persons thereto, and not having done so, no action for an accounting against the administrator could be maintained. It is the duty of appellant here to have possession of this partnership property as the surviving partner, and he can acquire no right to maintain an action for an accounting against respondents by reason of his refusal to perform this duty.

But the allegation in the amended complaint in the case at bar is not that plaintiff is not in possession of partnership assets. The averment merely is that "plaintiff is not possessed of any of the assets of said partnership save constructively as to certain parcels of real estate which are held in their joint names." This, it is submitted, is an affirmative showing of possession of partnership assets and requires plaintiff to proceed as the statute directs.

Counsel for appellant cite in their brief the case of *Franklin* v. *Trickey*, 9 Ariz. 282, 11 Ann. Cas. 1105, 80 Pac. 352, to sustain the contention that upon the dissolution of a partnership an accounting of one partner against another partner can be had. That general rule is cheerfully conceded, but it does not

follow, as counsel insist, that if, with Frank Mares alive, this action could be maintained, with Frank Mares dead, it can be likewise maintained. This, indeed, is the fundamental error in the entire argument of counsel for appellant. With both partners living they stand upon an equality before the law. Neither has exclusive possession of the partnership assets, and upon neither is imposed the exclusive duty of accounting to the other. With one partner dead, however, the situation is wholly changed. Upon the happening of that event the surviving partner at once becomes entitled to the exclusive possession of the partnership assets, and the duty immediately devolves upon him to wind up the partnership affairs and account to the personal representatives of the deceased partner. Clothed with these rights and resting under these obligations, the surviving partner finds the duty of accounting shifted from an equality and put upon him alone. But the case of *Franklin* v. *Trickey*, *supra*, is not an authority for the proposition to sustain which it is cited by counsel for appellant. Indeed, a cursory examination of the facts stated in the opinion discloses that there the situation was precisely opposite to that disclosed by the record in the case at bar. There the action was instituted by the personal representative of the deceased partner against the personal representative of the surviving partner, which is analogous to an action by Emma Mares, executrix, against appellant as the surviving partner. Of course such an action as that can be maintained for the very sufficing reason that the statute imposes the duty upon appellant to account to Emma Mares, executrix, and this duty can be enforced by the courts. The converse, of course, is not true; for the statute does not impose any duty upon Emma Mares, executrix, to account to appellant.

This court in the case of *Boehme* v. *Fitzgerald*, 43 Mont. 226, 115 Pac. 413, said that the surviving partners were still entitled to continue the possession and to settle the partnership affairs. It would be their duty to account to the administrator.

[60 Mont. 36.]

MR. JUSTICE GALEN delivered the opinion of the court.

This action was brought by the plaintiff for a partnership accounting. The defendants are the widow and minor daughter of Frank Mares, deceased, the former being made a party individually, and as executrix of the last will and testament of the decedent. Judgment is sought against the executrix of the estate for moneys alleged to be due to the plaintiff, on a claim against the deceased partner, for cash advanced by the plaintiff over and above the amount of contribution made to the copartnership by the deceased, and for money drawn by the decedent in excess of his portion of the profits. A general demurrer was interposed to the amended complaint and sustained by the lower court, and judgment was entered for the defendants. This appeal is from the judgment.

Four specifications of error are made by the plaintiff, all of which are summarized in but one question, *viz.*: Does the complaint state facts sufficient to constitute a cause of action? The amended complaint alleges, in substance, as follows:

Paragraph 1 alleges that, on or about May 1, 1892, plaintiff and Frank Mares, deceased, formed and entered into a copartnership, by the terms of which they agreed to contribute an equal amount of money to the funds of the partnership, and they further agreed to become equal partners in the management of the business of the firm, and that this relation and copartnership were actively carried on by them until December 11, 1916, when Frank Mares died. Paragraph 2 alleges the appointment and qualification of Emma Mares as executrix; that she is the widow of deceased; that Blanche is fourteen years of age, and is the only child of the deceased, and that they are his only heirs. Paragraph 3 alleges the contribution to the business of the copartnership by the plaintiff of more than $118,925; that Frank Mares contributed merely a nominal sum thereto, the exact amount thereof being unknown to plaintiff; that Frank Mares from time to time took and used for his individual use and benefit large sums of money of firm assets, the sums so

taken largely exceeding the proportion to which he was entitled of the partnership assets, the amount thereof being unknown to plaintiff, and which can only be ascertained by an accounting of the affairs of the partnership; that during the same time the amounts drawn out of such business by plaintiff were less than what he was entitled to under the partnership agreement; that Frank Mares used large sums of firm moneys, for his private use, over and above what he was entitled to; in many instances failed to keep an account or record thereof on the books of the firm; that he invested partnership moneys in real and personal property the title to which he took in his own name, and which now so remains (the real property being described); that because of the fact that plaintiff contributed to the partnership sums so far in excess of those contributed by Frank Mares, and drew out so much less than Frank Mares, the plaintiff, on an accounting being had, is entitled, under the partnership agreement, to be reimbursed for the difference between the amounts contributed and received by him and those contributed and received by the deceased, which difference can only be ascertained after an examination of the books and papers of the firm and an accounting of its business and affairs. Paragraph 4 alleges that all debts of the firm have been paid, all of its affairs have been adjusted except the difference between the parties growing out of the partnership, and that plaintiff is not possessed of any of the assets of the firm save, constructively, as to certain parcels of real estate which are held in their joint names, but which in value are much less than what plaintiff is entitled to on an accounting of the affairs of the partnership. Paragraph 5 alleges a demand for an accounting and adjustment of the affairs of the partnership, made upon Frank Mares during the last year of his life, and upon his executrix, and a refusal thereof on the part of each of them.

The prayer is for an accounting; that the described real estate and personal property purchased with partnership funds be declared partnership property and assets; that all property

of the partnership be sold and the proceeds applied toward the sum found due plaintiff on an accounting; that plaintiff have judgment for any balance that may be found due against the defendant executrix; that such judgment be ordered paid out of any individual property of deceased in her hands as such executrix; and for general relief.

The complaint was filed August 6, 1918, one year and eight months after the date alleged of the death of Frank Mares, the deceased partner. As noticed from the allegations of the complaint, the plaintiff seeks an accounting of the business and affairs of the partnership of Mares Bros., covering over twenty-four and a half years, alleging that in the last year of his brother's life he demanded an accounting, and that Emma Mares, executrix of his brother's estate, although demand has been made upon her, has refused to account. There is no allegation in the amended complaint that the defendants, or either of them, know anything about the alleged advancements made to the partnership by the plaintiff, or of the appropriation of moneys belonging to the partnership by the deceased, or that they have in their possession knowledge of any facts connected with the partnership affairs, or that they are for any reason or at all, in position to make an accounting to the plaintiff touching the affairs of the partnership. It is alleged that the deceased used the partnership funds, and "in many instances failed to make or keep an account or record thereof on the books of the firm," and that "the aggregate amount of said sums is to the plaintiff unknown." There being no entries in the books, the plaintiff being ignorant of the items, it would appear impossible to exact from the executrix, the surviving widow of the deceased, and of her minor daughter, an accounting of the partnership business extending for a period of nearly twenty-five years. And more particularly so, since it is not alleged that they, or either of them, have knowledge of the partnership affairs, or are in any position to make an accounting.

And as showing that all the partnership affairs have not been settled, appellant sets forth in his amended complaint that there is an indebtedness due him from the partnership assets of $118,925, which he wants paid out of the partnership assets; that large sums have been invested in real estate and mining claims, and he wants the partnership adjusted in that particular. He also wants the partnership adjusted as to the amount contributed by him and the amount contributed by Frank Mares, the deceased partner. According to these allegations in plaintiff's amended complaint the partnership was far from being settled, and "all of its affairs adjusted, terminated, and wound up."

A general partnership is dissolved by the death of one of the [1] partners (sec. 5494, Rev. Codes), and it is the duty of the surviving partner to make account to the personal representative of the deceased partner. (Sec. 7607, Rev. Codes.) The law imposes this duty upon the surviving partner, and not upon the representative of the estate; so that it is the plain duty of the surviving partner to make such accounting, rather than exact the same from the personal representative of the deceased partner. The surviving member of the copartnership is presumed to have the possession of, and knowledge concerning, the books of account, property, and assets of the firm; and he is given express statutory authority to continue in the possession of the partnership property, and to settle up its business after the dissolution of the partnership by death of one of its members, irrespective of the appointment and qualification of a personal representative of the deceased partner's estate. The statute (sec. 7607, Rev. Codes), reads as follows:

"When a partnership exists between the decedent, at the time of his death, and any other person, the surviving partner has the right to continue in possession of the partnership, and to settle its business, but the interest of the decedent in the partnership must be included in the inventory and be appraised as other property. The surviving partner must give a bond with

sufficient sureties in favor of the executor or administrator in a sum at least equal to the value of the interest of the deceased partner in the property of the partnership. The amount of said bond must be fixed and the bond approved by the judge. In case he fails to give such bond, the court or judge may compel its execution by attachment or other proper order. The surviving partner must settle the affairs of the partnership without delay, and account with the executor or administrator, and pay over such balances as may from time to time be payable to him, in right of the decedent. Upon the application of the executor or administrator, the court or judge may, whenever it appears necessary, order the surviving partner to render an account, and in case of neglect or refusal may, after notice, compel it by attachment; and the executor or administrator may maintain against him any action which the decedent could have maintained. The surviving partner is a trustee of the estate or interest of the deceased partner in the property of the partnership for every purpose and the court or judge may require the surviving partner to account at any time."

Under the provisions of the statute (*Id.*, sec. 7607), the surviving partner has the right (1) to continue in the possession of the partnership; (2) and to settle the business. And he must (1) settle the affairs of the partnership without delay; (2) account to the executor or administrator; and (3) pay over to him such balances from time to time as are due in right of the decedent. The surviving partner is made the trustee of the estate or interest of the deceased partner in the property of the partnership for every purpose, and he may be compelled to account. This law is plain, and requires the surviving partner to account to the executrix, not that she shall account to him. This statute was copied from California, which was there first adopted in 1850, as section 199 of the Probate Act (Laws 1850, p. 393), and was thereafter re-enacted as section 198 of Chapter 124 of the Laws of 1851, and re-enacted March 11, 1872, and again April 16, 1880, carried forward as section 1585 of the

Code of Civil Procedure. (Kerr's Cyc. Codes, sec. 1585.) In the territory of Montana it was first enacted as section 229 of the laws of 1877, page 301, and again re-enacted as section 229 of the Second Division of the Revised Statutes of 1879, and again re-enacted as section 229 of the Second Division of the Compiled Statutes of 1887, and by section 1, page 146, Laws of 1889, it was amended slightly by the following addition, to-wit: "The surviving partner must give a bond with sufficient sureties in favor of the executor or administrator in a sum at least equal to the value of the interest of the deceased partner in the property of the partnership. The amount of said bond must be fixed and the bond approved by the judge. In case he fails to give such bond, the court or judge may compel its execution by attachment or other proper order." And as amended it was carried forward as section 2734 of the Civil Code of Procedure of 1895 of the state, with additional amendment at the end thereof by inclusion of the following language: "The surviving partner is a trustee of the estate or interest of the deceased partner in the property of the partnership, for every purpose, and the court or judge may require the surviving partner to account at any time." And it was carried forward in this amended form as section 7607 of the Revised Codes of 1907. In all material substance as applicable to the [2] question, the Act before us was copied from California, and it is settled by the decisions in this court that its adoption carries with it the construction placed thereon by the courts of that state. (*State ex rel. Rankin, Attorney General,* v. *Board of Examiners,* 59 Mont. 557, 197 Pac. 988, and cases there collected.) However, it appears that the supreme court of California did not construe its statute with reference to the question here involved, until subsequent to our adoption thereof. On August 31, 1886, the supreme court of California, in construing its statute upon this subject, held, in the case of *McKay* v. *Joy*, 70 Cal. 581, 11 Pac. 832, that a surviving partner cannot maintain an action against the personal repre-

sentative of his deceased partner for an accounting of the partnership affairs. This case was first decided in an opinion rendered February 19, 1886, by the supreme court commission of California, adopted by the court (2 Cal. Unrep. 639, 9 Pac. 940), wherein it was held that under the statutes of California the surviving partner cannot successfully maintain an action against the administrator of a deceased partner's estate for an interest in the assets thereof without first presenting a claim to the personal representative, as required by the statutes. The case, as stated by the commissioners, showed that McKay and one Joy were partners. Joy died, and the defendant Joy was appointed administrator. The partnership property, which was in the hands of McKay, was taken from him by writ of replevin, and delivered by the sheriff to Joy, the administrator. McKay then brought suit against Joy as administrator for an accounting of the partnership property. It appeared on the trial that no claim had ever been presented to the administrator, and the commissioners held that the court below rightfully granted a nonsuit because of the failure to file such claim. The commissioners held that McKay, as a surviving partner, had a right to continue in possession of the partnership property, and could have successfully defended the action in replevin by which the property was taken from him, or could have maintained an action to recover it back; but that the accounting asked for was based upon a claim made against the estate of the decedent arising on a contract, and as such the claim should have been first filed as required by the statute.

These are the only decisions called to our attention construing this statute, with respect to the obligation to make accounting after the termination of a copartnership by the death of one of its members; and, aside from the persuasive influence upon us to accept California's interpretation of this statute in this respect, we feel the correct rule is expressed in these decisions.

[60 Mont. 36.]

In applying our statute in the case of *Krueger* v. *Speith*, 8 Mont., at page 488, 3 L. R. A. 291, 20 Pac. 664, Mr. Justice De Wolfe, said: "The representatives of the deceased partner have a right to the balance that will be found to belong to the decedent; they also have a right to compel the surviving partner to apply the assets to the debts, and not waste it or delay settlement. This is obviously not a tenancy in common, even in equitable contemplation; and though the representatives of the deceased have been called *cestuis que trustent*, and the survivor a trustee for them, this doctrine is at most but partially true, and is distinctly repudiated by some great courts. (See, also, *Bush* v. *Clark*, 127 Mass. 111.)

"In *Theller* v. *Such*, 57 Cal. 447, in construing a statute like ours, the court says: 'The probate court has no more jurisdiction to provide for a partnership account, and decree a balance where a partnership has been dissolved by the death of a partner, than when it has been dissolved by any other cause.' The assets which pass to the executor or administrator consist of the individual estate of the deceased; partnership assets, as such, form no part of such individual estate. The residuum only, after satisfying liabilities and advances, if any, made by the survivor, becomes the property of the estate. (So, also, *Andrade* v. *Superior Court of San Francisco*, 75 Cal. 459, 17 Pac. 531.)

"If it was otherwise, immediately on the death of one of the members of a partnership, the partnership estate would be *in custodia legis*, and would have to be administered and settled like any private or individual estate. Our statute does not contemplate a proceeding like this, and while it requires the inventory to include the interest of the decedent in a partnership, it also gives to the surviving partner full power over the partnership estate and property for the purpose of settling and accounting, and subjects him to legal proceedings only when he fails to perform his duty within a reasonable time. He gives no bond such as is required to be given by an ad-

ministrator, nor do accounts against the partnership require the formal proofs or allowance which the law requires in the case of claims against an estate. None of the requirements with which the law surrounds an administrator are required of a surviving partner in the settlement of a partnership estate, but all such matters are left to the judgment and presumed knowledge of the surviving partner, and his acts, if done in good faith, bind alike his own and the interest of the representatives of the deceased partner in the partnership property. (Story on Partnership, sec. 328.)

"The authorities to which we have referred settle the question that it is only in a qualified sense that a surviving partner is a trustee of the representatives of a deceased partner. He takes, or rather retains, the partnership property, *jure proprio;* and the only trust which attaches to his possession and disposition of the property is his duty to settle up the affairs of the partnership and account to the representatives of the deceased partner, a duty as we have seen, which he may be compelled to perform if he neglects or unreasonably defers."

In the case of *Silver* v. *Eakins*, 55 Mont. 210, 175 Pac. 876, it appears that Eakins and Silver were copartners; that Silver was sole surviving partner; that the sum of $1,920.80 was paid to Eakins in his lifetime on account of money due the copartnership of Silver & Eakins, and that claim was presented for such amount by Silver, acting as the sole surviving partner, against the estate of Eakins, and disallowed by the executrix of the estate of John Eakins, deceased. Mr. Justice Holloway, speaking for this court, said:

"Briefly, the complaint charges that Eakins & Silver were copartners, engaged in completing the work under the McCune contracts; that Silver is sole surviving partner; that the $1,920.80 was and is partnership money; that it was received by Eakins and retained as a part of the assets of his estate; that plaintiff presented a claim for the amount; and that the claim was rejected. The answer admits the death of Eakins,

the qualification of defendant as executrix, the rejection of plaintiff's claim, and denies all the other material allegations of the complaint. By way of affirmative defense it was alleged that Silver had failed to give the surviving partner bond required by section 7607, Revised Codes. On motion of plaintiff this defense was stricken from the answer. The trial resulted in a judgment for plaintiff, and from that judgment, and from an order denying a new trial, defendant appealed.

"Does the complaint state a cause of action? Section 7607 defines the rights, duties, and liabilities of a surviving partner. It authorizes him to continue in possession of the partnership, to settle its affairs, and to account and pay over to the personal representative of the deceased partner any balance due in right of the decedent. Apparently the complaint was drawn upon the theory that the surviving partner is entitled as of right to the possession of all the firm assets until the partnership affairs are finally settled. If the partnership assets in the possession of Silver, as surviving partner, were sufficient to pay the partnership debts, then any balance due him in right of his partnership interest could be recovered only on a settlement of the firm account. (*Franklin* v. *Tonjours*, 1 White & W. Civ. Cas. (Tex.), sec. 506.) If the partnership assets in his possession exceeded the debts and Silver's interest, then manifestly it would be an idle ceremony to require the estate to deliver this $1,920.80 to the surviving partner, only to require him to redeliver it to the estate upon final settlement. These observations suffice to disclose the reasonableness of the rule which requires the surviving partner to make known the amount of partnership debts and the amount of firm assets in his possession, to the end that the court may determine whether possession of firm property held by the estate of the deceased partner is necessary, in order that the surviving partner may discharge the duties imposed upon him by statute. The complaint does not disclose the amount of firm debts, if any, nor the amount or value of firm assets in the possession of the

surviving partner, and for this reason it does not state a cause of action. (*Painter* v. *Painter's Estate*, 68 Cal. 395, 9 Pac. 450.)

"We do not agree with appellant however, that if the complaint contained these essential allegations it would still not state a cause of action. It is true that one partner cannot maintain an action at law against his copartner, at least until an accounting is had and a balance determined, and the reason for this rule is apparent. The interest of each partner extends to every portion of the firm property (sec. 5469, Rev. Codes), and therefore neither partner is entitled, as against the other, to the exclusive possession of the whole or any specific part of the partnership assets. (*Boehme* v. *Fitzgerald*, 43 Mont. 226, 115 Pac. 413.) But whenever the reason for that rule ceases, so does the rule itself, and the reason ceases immediately upon the death of one partner. The partnership is thereupon dissolved (sec. 5494), and the surviving partner becomes at once entitled to the possession of sufficient firm property to enable him to discharge the duties imposed by section 7607. (*First Nat. Bank* v. *Silver*, 45 Mont. 231, 122 Pac. 584.) If, then, it was made to appear by this complaint that possession of this $1,920.80 was necessary to settle the firm debts, an action for money had and received would lie to recover it. (*Conger* v. *Atwood*, 28 Ohio St. 134, 22 Am. Rep. 462; 20 R. C. L., p. 1010.)"

A fortiori, the complaint in the instant case, by the surviving partner against the executrix, seeking an accounting from the personal representative of the deceased partner, does not state a cause of action, as it appears therefrom that the partnership affairs have not been settled, and that there is an indebtedness due the plaintiff from the copartnership of $118,925. All of its affairs have not been terminated and settled as alleged in the complaint, and until the surviving partner has accounted to the executrix and performed his trust, he has nothing more

than a contingent claim against the estate of the deceased partner.

After dissolution, by death or from any other cause, a [3] partnership still has a limited existence for the purpose of closing up the affairs of the partnership. The firm is to this extent not completely dissolved until its affairs are closed. Up to that time the joint interest of the partners continues in the partnership property, and the mutual agency continues for the purpose of winding up its business. (*Kinsler* v. *McCants*, 4 Rich. (S. C.) 46, 53 Am. Dec. 711; *Maynard* v. *Richards*, 166 Ill. 466, 57 Am. St. Rep. 145, 46 N. E. 1138; *Brown* v. *Higginbotham*, 5 Leigh (Va.), 583, 27 Am. Dec. 618). So far as is necessary for the purpose of closing the concerns of the partnership it continues with all its incidents of interest, powers and obligations. (*Davis* v. *Megroz*, 55 N. J. L. 427, 26 Atl. 1009.) In legal contemplation the partnership continues for the purpose of making good all outstanding engagements, of taking and settling all accounts, and collecting all the property, means and assets of the partnership existing at the time of its dissolution, for the benefit of all interested. (*Western Stage Co.* v. *Walker*, 2 Iowa, 504, 65 Am. Dec. 789; *Johnson* v. *Totten*, 3 Cal. 343, 58 Am. Dec. 412.)

"The property of the partnership, until the affairs of such partnership be settled and his share paid over to his administrator, is in no sense property of the decedent, or property to be administered as a part of his estate. Indeed, except for the circumstances of this case, namely, the death of both partners before the partnership was wound up, the administrator, as such administrator, would have no right to the partnership assets, but the surviving partner would have the right to possession." (*Franklin* v. *Trickey*, 9 Ariz. 282, 11 Ann. Cas. 1105, 80 Pac. 352.)

The personal representative of the deceased partner, not being entitled to the property, assets and books of the partnership, may exact an accounting from the surviving partner. (*Frank-*

lin v. *Trickey, supra.*) The same rule, however, does not apply with respect to the surviving partner. Had Frank Mares lived, an action for an accounting could have been maintained against him, and at any time during the period of nearly a quarter of a century of the continuance of the partnership business, the plaintiff, Joseph Mares, was entitled to an accounting as against his partner, Frank Mares; but after the dissolution of the partnership by death of one of its members, he is in no position to exact such accounting, being himself in position to obtain all desired information respecting the books, property and assets of the copartnership, and in contemplation of law, in actual possession of the partnership property and estate. Upon the death of Frank Mares, Joseph Mares, the surviving partner, at once became entitled to the exclusive possession of the partnership assets, and there at once devolved upon him the duty of winding up the partnership affairs and of making an account to Emma Mares, as executrix of the last will and testament of the deceased partner. Clothed with these rights and resting under these obligations, the surviving partner is left with the sole duty of making the accounting. The death of one of the partners and the continued possession of the partnership property by the other changes the rule of mutuality of obligation to account one to the other.

For the reasons stated the judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, COOPER and HOLLOWAY concur.

ON MOTION FOR REHEARING.

MR. JUSTICE GALEN delivered the opinion of the court.

On motion filed for a rehearing, it is earnestly urged and argued by counsel for the plaintiff that the complaint states a cause of action under the allegations of paragraph 3 thereof on the theory of a resulting trust, and the decisions of this

court in the cases of *Eisenberg* v. *Goldsmith*, 42 Mont. 563, 113 Pac. 1127, and *Huffine* v. *Lincoln*, 52 Mont. 585, 116 Pac. 820, are cited and relied upon. This contention is without merit, as the plaintiff predicates his cause of action upon his individual rights, rather than those of the partnership. However, this is the first time that this point has been presented, urged or [4] argued, and it is the settled rule that this court will not, on an application for rehearing, consider grounds for reversal not presented upon the original hearing. (*Merchants' Bank* v. *Greenhood*, 16 Mont. 460, 41 Pac. 250, 851; *Forrester* v. *Boston & Montana Mining Co.*, 21 Mont. 565, 55 Pac. 353; *Kaufman* v. *Cooper*, 38 Mont. 16, 98 Pac. 504, 1135; *In re Murphy's Estate*, 57 Mont. 286, 188 Pac. 146.)

It must be borne in mind that this action is not based upon the right of Joseph Mares as surviving partner to recover the partnership property for the benefit of the partnership, but, as appears from the allegations of the complaint and as stated in the original opinion, it is one for an accounting for the sole benefit of the plaintiff. The plaintiff is at least constructively in possession of all partnership books, property and assets, and is not in position to require an accounting from the executrix of the estate of the deceased partner respecting matters presumably alone within his knowledge and control. His duty as surviving partner is to subject all partnership assets to his possession and control, adjust and conclude the partnership affairs, [5] and render account to the executrix of the deceased partner. If, upon liquidation of the partnership business, or in course thereof, it appears that the deceased partner is indebted to him over and above the partnership assets, then he must present his claim for allowance under the provisions of section 7525 of the Revised Codes.

In the case before us, having made selection of a remedy, he is bound thereby. The motion for a rehearing is denied.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, COOPER and HOLLOWAY concur.

CASEY, RESPONDENT, *v.* NORTHERN PACIFIC RY. CO., APPELLANT.

(No. 4,327.)

(Submitted April 12, 1921. Decided May 16, 1921.)

[198 Pac. 141.]

Personal Injuries—Railroads—Master and Servant—Evidence—Insufficiency—New Trial—Refusal—Abuse of Discretion—Appeal and Error—Verdict—Conflict in Evidence—Rule—Distances—Estimates—Exact Measurements Controlling.

Personal Injuries—Railroads—Master and Servant—Evidence—Insufficiency.

1. In an action for injuries sustained by a locomotive engineer who jumped from his engine just before it collided with a train ahead of him, plaintiff's testimony, which contradicted itself as to essential details, which was contradicted by his own witness and by the harmonious testimony of the other employees offered by defendant, and much of which was inherently improbable, *held* insufficient to sustain a verdict in his favor.

Same—Appeal and Error—Conflict in Evidence—When Verdict not Conclusive.

2. The rule that a verdict returned upon conflicting evidence and approved by the trial court by its order denying a new trial, will not be disturbed on appeal if there is some substantial evidence to support it, has reference to real conflicts arising between testimony introduced by plaintiff and that given by opposing witnesses, and not to conflicting statements made by himself or those of his witnesses.

Same—Jury may not Arbitrarily Disregard Unimpeached Testimony.

3. Juries may not arbitrarily and capriciously disregard the testimony of witnesses which is unimpeached in any of the usual modes known to the law and supported by all the circumstances in the case.

Same—New Trial—Insufficiency of Evidence—Refusal, When Error.

4. The advantageous position occupied by the jury and the lower court in weighing the testimony of witnesses who appear before them in a personal injury action does not prevent a reversal of the order denying a new trial on the ground of insufficiency of the evidence, where the testimony supporting the verdict is highly improbable or incredible or is inherently impossible in view of the physical facts.

Same—When Physical Facts Controlling Over Testimony.

5. Where physical conditions surrounding an accident point so unerringly to the truth as to leave no room for a contrary conclusion based on reason or common sense, the mere fact that testimony is introduced in conflict with them is not sufficient to make a case for the jury.

---

5. Testimony contrary to physical facts as withdrawable from jury, see notes in 15 **Ann. Cas.** 1190; **Ann. Cas.** 1917B, 475.

[60 Mont. 56.]

Same—When Court may Disregard Unimpeached Testimony.

6. A court may reject the most positive testimony of a witness though not discredited by direct evidence impeaching him or contradicting his statements, where his story is inherently improbable, creditable swearing only concluding its judgment.

Same—Appeal and Error—Verdict—Sufficiency of Evidence—Self-contradictory Statements of Plaintiff—How Viewed on Appeal.

7. In determining whether plaintiff's testimony is sufficient to support a verdict in his favor, his case may be judged by that portion of his self-contradictory testimony which is least favorable to him.

Same—New Trial—Refusal—When Abuse of Discretion.

8. Where plaintiff in a personal injury action wholly failed to make out a case, and the testimony of defendant's witnesses did not supply the defects, the court abused its discretion in denying a motion for new trial.

Same—Evidence—Estimates of Distances—Exact Measurements Controlling.

9. Under the rule that proof of actual measurements is so far superior to an estimate of distances that no issue for the jury is raised by a conflict between the two, measurements made by a civil engineer between points on a railway track an exact determination of which was vital in the trial of an action by a locomotive engineer who was injured by a collision were controlling over mere estimates made by plaintiff who by his testimony had demonstrated that he was without capacity for judging distances or colored his statements to meet the exigencies of his case.

Appeal from District Court, Gallatin County; Ben B. Law, Judge.

ACTION by Wiliam B. Casey against the Northern Pacific Railway Company. Judgment for plaintiff, and defendant appeals from the judgment and from an order denying its motion for new trial. Reversed, with directions to dismiss the complaint.

Mr. W. S. Hartman and *Messrs. Gunn, Rasch & Hall,* for Appellant, submitted a brief; *Mr. E. M. Hall* argued the cause orally.

The only testimony that even tends to justify the verdict is that of the plaintiff himself. If the unsupported testimony of this vitally interested witness is in direct conflict with prior statements of such witness and is impeached and rendered

---

6. Weight of uncontradicted testimony, see notes in 4 Ann. Cas. 982; 12 Ann. Cas. 245.

improbable by the conceded facts and circumstances in the case, and also by undisputed physical conditions, then there is no substantial conflict between his testimony and that of the defendant. Under such circumstances, the case is governed by the decisions of this court in the following authorities: *McAllister* v. *McDonald*, 40 Mont. 390, 106 Pac. 882; *Escallier* v. *Great Northern Ry.*, 46 Mont. 238, Ann. Cas. 1914B, 468, 127 Pac. 458; *Rood* v. *Murray*, 50 Mont. 240, 146 Pac. 541; *Nelson* v. *Big Blackfoot Mill. Co.*, 17 Mont. 553, 44 Pac. 81. See, also, the following cases where the plaintiff's testimony was so far impeached and discredited that the appellate court held that there was no substantial conflict in the evidence: *Glennon* v. *Erie R. Co.*, 86 App. Div. 397, 83 N. Y. Supp. 875; affirmed in 180 N. Y. 562, 73 N. E. 1124; *Houghton* v. *Loma Prieta Lumber Co.*, 152 Cal. 574, 93 Pac. 377; *Cyr* v. *Landry*, 114 Me. 188, 95 Atl. 883; *International etc. R. Co.* v. *Brice* (Tex. Civ. App.), 111 S. W. 1094; also, note to case of *McCarthy* v. *Bangor etc. Ry. Co.*, L. R. A. 1915B, 140.

Messrs. Miller, O'Connor & Miller, for Respondent, submitted a brief; *Mr. James F. O'Connor* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On the evening of March 1, 1917, Northern Pacific freight train No. 1713, westbound, left Winston at 8:03 for East Helena, followed immediately by engine No. 1288, which had assisted the train from Townsend to Winston, and at the latter place had been cut off. The distance from Winston to East Helena is 15.9 miles, but on account of train troubles No. 1713 did not reach the East Helena yard limits until 8:52. The train was required to take the siding and moved to and a few feet past the switch before it came to a stop. There were some sixty-four cars in the train, and the caboose stood a short distance east of the yard limit board. Engine 1288 stopped from

forty-five to fifty feet east of the caboose. Twenty-six minutes after train 1713 left Winston, another west-bound freight No. 1746, also left Winston for East Helena, with a load of 1,550 tons (twenty-eight loaded cars and six empties), and somewhere near 9 o'clock ran into engine 1288, forcing it forward into the rear of train 1713. Just before the collision, William B. Casey, the engineer in control of train 1746, jumped from his locomotive, fell and sustained injuries. He brought this action to recover damages, and charged the railway company with negligence in failing to give timely warning that train 1713 was standing upon the main line track and extending eastward of the yard limit board.

The answer denies any negligence on the part of the company, or its agents and servants in charge of train 1713, and alleges negligence on the part of the plaintiff in approaching the yard limit board at an excessive rate of speed. The trial resulted in a verdict in favor of plaintiff, and from the judgment entered thereon and from an order denying a new trial defendant appealed.

Of the several assignments of error but one requires consideration. Is the evidence sufficient to sustain the verdict?

It is established by the evidence without controversy that it [1] was the duty of the rear brakeman on train 1713 to exercise reasonable care to give full protection to train 1746 by warning signals; that he did warn it with his lighted lantern and a lighted fusee, and that the signals were seen by the plaintiff before the collision occurred; that it was the duty of plaintiff to approach the yard limits with train 1746 under such control that he could stop if necessary; and that plaintiff knew that he was required to take the East Helena siding to permit train 222 to pass upon the main line track.

It is conceded that a considerable distance east of the yard limit board the track runs through a cut; that west of the cut the track curves to the south, then runs straight for some distance, and then curves slightly to the north; and that plaintiff

could not see the rear lights on train 1713 or on engine 1288 until he reached the straight track.

In order to determine whether the brakeman was negligent in failing to warn plaintiff at a sufficient distance from engine 1288 that by the exercise of ordinary care train 1746 could have been stopped and the collision avoided, the answer to each of the following inquiries is of primary importance: (a) Where was the rear end of train 1713 with reference to the yard limit board, and where was engine 1288 when the collision occurred? (b) Where was the brakeman when train 1746 came into view? (c) Where does the straight track begin from the east? (d) Where is the cut referred to in the evidence? (e) How far was plaintiff from engine 1288 when the signals were first seen? (f) At what rate was plaintiff running his train?

(a) In his complaint plaintiff alleges that the rear end of train 1713 was seventy-five feet east of the yard limit board, and again he alleges that it was 275 feet east of that point. Upon the trial he testified that it was five car-lengths east of the yard limit board and that the cars average fifty feet in length. He alleges that the rear of engine 1288 was 350 feet east of the board, and that his train collided with it 400 feet east of that point.

(b) Plaintiff testified that he saw the lighted fusee in the brakeman's hand and the rear lights on engine 1288 at the same instant; that when he first saw these signals the brakeman was four or five car-lengths east of the rear of engine 1288 and was going east. Later he testified that immediately after the collision he met the brakeman four car-lengths east of the front of train 1746. The undisputed evidence is that the impact drove the caboose of train 1713 westward to the yard limit board a distance of 250 feet according to plaintiff's testimony, so that, if the second statement above is true, the brakeman was not as far east when the collision occurred as he was when plaintiff first saw him, though he was traveling eastward all the time. At an investigation held at Livingston four days after

the collision, at which the train crews were present and several witnesses, including the plaintiff, were examined touching the cause of and responsibility for the collision, the plaintiff then stated that immediately after the collision he met the brakeman about the middle of train 1746, and he testified that the train consisted of thirty-four cars. At the same investigation he testified: "I say Brakeman Moorehead was not over ten car-lengths behind helper" (engine 1288).

(c) Plaintiff contented himself with giving estimates of the distances. He did not undertake to locate definitely the point where the straight track commences from the east, but inferentially he fixed it at 350 feet east of the rear of engine 1288, for he testified that he saw the signals when he first came upon the straight track, and that he was then seven car-lengths from engine 1288. By actual measurements the distance from the yard limit board to the point where the straight track commences from the east is 1,600 feet in round numbers. If the rear of engine 1288 was 350 feet east of the yard limit board, as alleged in plaintiff's complaint, then the straight track actually commences 1,250 feet east of the rear of engine 1288, instead of 350 feet, as estimated by plaintiff.

(d) Plaintiff also estimated that the rear of engine 1288 was twenty car-lengths, or 1,000 feet, west of the cut. The measurements disclose that the distance between the west end of the cut and the rear of engine 1288 is 2,326 feet, assuming that engine 1288 was stationed at the point fixed by plaintiff in his own testimony. Plaintiff testified that the cars average fifty feet in length, but a check of his own train from the wheel report disclosed that they averaged forty-four and three-tenths feet in length.

(e) Plaintiff alleges in his complaint that when he first observed the signals or received warning that a train was on the main line track east of the yard limit board he was only 150 feet from the rear of that train. Upon the trial he testified first that he was seven car-lengths away, and later testified that

he was eleven car-lengths away when he jumped from his engine, and that he jumped after he observed the signals and after he had set the brakes. At the investigation at Livingston he stated that he did not believe that he was over fifteen or sixteen car-lengths away. Marchington, the fireman on Casey's locomotive and a witness for plaintiff, testified that the brakeman was fifteen or sixteeen car-lengths away when he first saw the signals. If the brakeman was four or five car-lengths east of the rear of engine 1288, as plaintiff testified, then train 1746 was from nineteen to twenty-one car-lengths from engine 1288 when the signals were first seen.

(f) Plaintiff testified that he had exceeded thirty miles per hour on straight track after he left Winston. At Livingston he stated that he averaged about twenty-eight or twenty-nine miles per hour from Placer, through Louisville and to the cut. Upon the trial he testified that when he first applied the brakes in the cut he was going twenty miles per hour, and later testified that he was running twenty-five miles per hour, and again that when he applied the brakes he reduced his speed to twenty-five miles per hour. He testified that when he first saw the signals he had reduced his speed to fifteen miles per hour and could have stopped his train and avoided the collision if he had had eleven car-lengths distance within which to do it. He also testified that he was eleven car-lengths away from engine 1288 when he jumped, and that he jumped because he saw he could not stop in time to avoid the collision, and that, with the brakes set, his train was still going about six miles per hour when it struck engine 1288. He also testified that, if his train had been running twenty-five miles per hour, he could have stopped in eighteen or nineteen car-lengths (900 to 950 feet), but he failed to stop within 1,250 feet or twenty-five car-lengths.

Whatever other controversy may arise over the rate at which train 1746 was traveling when the collision occurred, the fact remains that the impact was sufficient to practically destroy

engine 1288 and to drive it forward (though the brakes on it were set), demolishing the caboose and one car in train 1713, derailing five or six other cars, and carrying the broken caboose to the yard limit board, a distance of 275 feet according to plaintiff's own theory.

Plaintiff testified that the brakeman was only four or five car-lengths east of the rear of engine 1288 and should have been back seven car-lengths farther than he was "to have flagged my train so as to give me time in which to stop. * * * If he had been eleven cars back of the rear engine No. 1288, I could have stopped my train." Again he testified that the brakeman should have gone "beyond the cut to have given us the necessary advice as to the position of the train on the main line." The first statement would place the brakeman 550 feet east of the rear of engine 1288; the last one would require him to be approximately half a mile from that point.

Plaintiff testified that after the collision he went to his locomotive "and stayed on it until it was towed into Helena." Later he admitted that his locomotive "was in shape so that it could go on its own power"; and it is admitted that his engine did go into Helena on its own power and pulled train 1746.

During the first day of the trial of this case plaintiff was examined at length by his own counsel and cross-examined by counsel for the railway company, during which examination he referred to the fact that immediately after the collision he had a conversation with the brakeman, but did not tell what was said. On the second day of the trial he was recalled by his counsel and then testified as follows: "When I got up after that fall, I started for my engine, and as I was on the way to the engine I met the flagman of train 1713 west, between where I got up and the rear end of their train, about four car-lengths from the head end of my engine. I had a conversation with the flagman at this time; I said to him, 'Why didn't you get back to stop me?' and he said, 'I would, but I didn't know what we were doing here.' He said, 'We expected to move

every minute, and when I saw you coming I beat it back.' That was the excuse he gave me for not getting back to flag us." When asked why he had not given this testimony the previous day while he was on the witness-stand, he replied, "I was never asked the question." At the investigation at Livingston he testified that he had the conversation with the brakeman, but his version of the conversation then was as follows: "I talked to him and asked him why he gave me such a short flag, and then I walked to the head end."

Although no complaint is made in the pleadings of the braking apparatus on train 1746, plaintiff testified that when he set the brakes preparatory to jumping "the emergency didn't work; * * * the braking apparatus on the train was not in good shape." At the investigation at Livingston he stated that he had a very good braking train, had no trouble stopping it at any place, and that the brakes handled the train very well. Plaintiff admitted that the investigation was held at the time and place mentioned; that he was present and examined as a witness; that the questions were asked by the superintendent and the evidence taken by the stenographer. He does not deny that he made the answers given above. He testified: "I was in such pain when I was up there and I was sick, and I don't remember what I did say." He admitted that soon after the investigation he was discharged by the railway company, the reason assigned being his "action in the collision at East Helena," but he assumed to assign a different reason as the one which actually prompted his discharge.

So far as any attempt was made to sustain the charge of negligence against the crew of train 1713, the plaintiff's testimony stands alone. The evidence for defendant may be stated briefly as follows: Grannis, the conductor on train 1713, testified that as soon as his train came to a stop he sent Brakeman Moorehead back east with a lantern and lighted fusee to signal train 1746; that the flagman was ten or twelve car-lengths east of the rear of train 1713 when he met engine 1288; that he

was about thirty car-lengths away when train 1746 came in sight; and that he (the witness) walked forward along his train thirty car-lengths after it stopped and before the collision occurred.

Jones, the engineer on 1288, testified that he met the flagman about twelve car-lengths east of the caboose of train 1713; that he answered the signal and spoke with the flagman; that the flagman continued on eastward and was about the "point of the curve" when train 1746 came in sight; that when he first saw the signal at about the mile-post he had his fireman drop a lighted fusee on the track, but it fell into soft snow and was smothered, and he had another—a yellow light—dropped, and it continued to burn. Barton, the fireman on 1288, testified to the same facts.

Cole, the conductor on 1746, testified that he was sitting in his caboose when the collision occurred; that he immediately went to the west door of the caboose and looked out and saw the flagman from two to five car-lengths west of him. Cole's train consisted of thirty-four cars and occupied 1,550 feet of track, so that, if his testimony is true, the flagman was from twenty-six to thirty car-lengths east of the point of collision when the trains came together.

Moorehead, the brakeman and flagman, testified that immediately after train 1713 stopped he started back with a lantern and lighted fusee; that he met engine 1288 when he was ten or twelve car-lengths east of the rear of train 1713; that he spoke with Engineer Jones and kept on going; that he saw the fusee thrown out by 1288, and that he was from thirty to thirty-five car-lengths from his own caboose when train 1746 passed him; that he received no recognition of his signal from Engineer Casey and threw his fusee at the cab window as the engine passed; that he was about two car-lengths west of the caboose on train 1746 when the collision occurred; that he went forward and talked with Conductor Cole and then started back west; that he met Casey about the middle of train 1746; that

Casey "asked me if I was flagging, and I told him that I was, and he said, 'Couldn't you get back any farther to stop me?' and I said, 'I got just as far as I could get with the time I had, Casey.' That is all the conversation we had at that time." He denied that the conversation as given by plaintiff at the trial ever occurred, and testified that at the investigation plaintiff had not mentioned that conversation.

Caldwell, the engineer on train 1713, testified that, when he stopped his train, he looked back and saw the flagman going east with a lighted fusee.

Le Van, a traveling engineer or road foreman, was riding with engineer Caldwell on the locomotive pulling train 1713. He testified that after train 1713 come to a stop and after train 1746 came through the cut he looked back and saw two burning fusees, one red one and one yellow; that the red one was farthest from him and was "away back."

The testimony discloses without substantial controversy that from five to eight minutes elapsed between the time train 1713 came to a stop and the collision occurred, and that the ground was covered with snow about eight inches deep.

In rebuttal Marchington testified that he did not see the yellow fusee thrown from engine 1288.

Counsel for plaintiff insist that the evidence is conflicting, **[2, 3]** and, since the jury found upon the issues and the lower court denied a new trial, this court is without authority to interfere, but the principal conflicts arise upon the plaintiff's own testimony, rather than in the testimony of opposing witnesses. Of the testimony of the witnesses for defendant it is sufficient to say that it is harmonious, and reasonable and consistent with physical facts, but the jury disregarded it altogether and must have based the verdict solely upon the surmises, the guesses and estimates of the plaintiff.

In *Haddox* v. *Northern Pac. Ry. Co.*, 43 Mont. 8, 113 Pac. 1119, this court said: "Juries may not arbitrarily and capriciously disregard testimony of witnesses, not only unim-

peached in any of the usual modes known to the law, but supported by all the circumstances in the case."

It is the general rule that an order denying a new trial upon the ground that the evidence is insufficient to sustain the verdict will not be reversed where the evidence is conflicting, if there is some evidence to support the verdict; but the rule has its foundation in the assumption that the conflict is real and the supporting evidence is substantial.

In *Driscoll* v. *Market Street Cable Ry. Co.*, 97 Cal. 553, 33 Am. St. Rep. 203, 32 Pac. 591, the supreme court of California said: "When a jury catches at a semblance or pretense of evidence for the purpose of somewhat equalizing financial conditions by taking money away from one party and giving it to the other without legal cause, the trial judge should, without hesitation, set the verdict aside; and in the event of his not doing so, this court will grant a new trial."

Primarily, it is the province of the jury to pass upon the credibility of the witnesses and the weight to be given to their testimony, but the determination of the jury is not conclusive. Insufficiency of the evidence is a statutory ground for a motion for a new trial (sec. 6794, Rev. Codes), and in passing upon the motion it is the duty of the trial court to weigh the evidence, and, if it is not sufficient to sustain the verdict, a new trial should be ordered (*Mullen* v. *City of Butte*, 37 Mont. 183, 95 Pac. 597), and, if it is not, the appellate court must then determine whether there is substantial evidence to warrant the verdict and will not abdicate its authority in favor of the jury's findings. Jurors are subject to the ordinary infirmities of human nature, and cases are sometimes presented wherein justice would be denied if the courts failed to interfere.

We are not unmindful of the advantageous position occupied [4] by the jury and the lower court in having the witnesses before them, in hearing them testify, and observing their demeanor; but, though the appearance of a witness is an aid in judging his credibility, it is not an infallible one. Dissim-

ulation is often difficult to detect, and falsehood is often clothed in the garb of truth. Whenever the surrounding circumstances make the story of a witness highly improbable or incredible, or whenever the testimony is inherently im- [5] possible, a new trial should be ordered. Physical conditions may point so unerringly to the truth as to leave no room for a contrary conclusion based on reason or common sense, and under such circumstances the physical facts are not affected by sworn testimony which in mere words conflicts with them. (*Groth* v. *Thomann*, 110 Wis. 488, 86 N. W. 178.)

The corollary of the first rule above is stated cogently in *McAllister* v. *McDonald*, 40 Mont. 375, 106 Pac. 882. It was there held that the supreme court is not authorized to affirm an order denying a new trial: (a) Where the evidence tending to support the verdict is an isolated statement of a witness which is in conflict with his other statements; or (b) when the verdict is contrary to the great weight of the evidence, and the evidence which tends to sustain the verdict is impeached or rendered improbable by conceded facts, or is against all reasonable inferences or probabilities of the case; or (c) when the verdict, though supported by some evidence, is so utterly at variance with the real and unexplained facts that the court can say that it is clearly wrong.

The rule has been stated repeatedly in this jurisdiction that [6] a court may reject the most positive testimony, though the witness be not discredited by direct evidence impeaching him or contradicting his statements. The inherent improbability of his story may deny it all claims to respect. (*McIntyre* v. *Northern Pac. Ry. Co.*, 56 Mont. 43, 180 Pac. 971; *Landsman* v. *Thompson*, 9 Mont. 182, 22 Pac. 1148; *Mattock* v. *Goughnour*, 11 Mont. 265, 28 Pac. 301.) The credulity of courts is not to be deemed commensurate with the facility or vehemence with which a witness swears. "It is a wild conceit that any court of justice is bound by mere swearing. It is swearing creditably that is to conclude its judgment." (*The Odin*, 1 Rob. Adm.

248; *Daniels* v. *Granite Bi-Metallic Co.*, 56 Mont. 284, 184 Pac. 836.)

It cannot be unfair to this plaintiff to deal with his case from [7] the standpoint of his own statements. A party testifying in his own behalf has no right to be deliberately self-contradictory, and whenever he is so the courts are justified in judging his case from that version of his testimony which is least favorable to him. (*Atlanta R. etc. Co.* v. *Owens*, 119 Ga. 833, 47 S. E. 213.)

In his testimony given upon the trial of this case the plaintiff [8] contradicted himself repeatedly; contradicted the allegations of his verified complaint; was contradicted by his previous statements, by the physical facts, by every one of defendant's witnesses, and by his own witness, Marchington. Some of his declarations are too transparent to be entitled to credence, are improbable upon any supposition short of actual mental imbecility.

The correct answer to every one of the inquiries suggested in the early part of this opinion is of vital consequence, and yet we undertake to say that the jury could not find an intelligent answer to any one of them in the testimony produced by the plaintiff, and, since the verdict finds no support in the testimony of defendant's witnesses, it is without substantial evidence to sustain it, and the trial court abused its discretion in denying the motion for a new trial.

Plaintiff contented himself with giving estimates and demonstrated that he was without capacity for judging distances, or [9] deliberately colored his testimony to meet the supposed exigencies of his case.

Erickson, a civil engineer and a witness who testified upon the trial of this case, measured the distances along the track and prepared a map which was introduced in evidence and which shows the distances between the points in controversy. In an exhaustive note to *Lalor* v. *City of New York*, reported in Ann. Cas. 1916E, 572, the rule deduced from the authorities

is stated as follows: "It is generally agreed that proof of an actual measurement is so far superior to an estimate of the distance that no issue for the jury is raised by a conflict between the two."

The judgment and order are reversed, and the cause is remanded to the district court, with directions to dismiss the complaint and enter judgment in favor of defendant for its costs.

Reversed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, COOPER and GALEN concur.

STATE, RESPONDENT, v. SCHRACK ET AL., APPELLANTS.

(No. 4,377.)

(Submitted April 21, 1921. Decided May 16, 1921.)

[198 Pac. 137.]

Criminal Law — Larceny — Circumstantial Evidence — Insufficiency.

Criminal Law—Circumstantial Evidence—Insufficiency.

1. Where, in a criminal cause, a conviction is sought upon circumstantial evidence, the criminatory circumstances proved must be consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any rational hypothesis other than guilt, mere suspicions or probabilities, however strong, being insufficient.

Larceny—Evidence—Insufficiency.

2. In a prosecution for larceny of a calf, evidence reviewed and *held* insufficient to sustain a conviction, under the above rule.

Appeals from District Court, Flathead County; T. A. Thompson, Judge.

HARVEY SCHRACK and George Rogers were convicted of larceny, and appeal from the judgment of conviction, and from

---

2. Authorities discussing the question as to whether killing animal and carrying away part of the carcass is larceny of the animal are collated in a note in L. R. A. 1915E, 848.

the orders denying their motion for a new trial. Reversed, and cause remanded with directions to dismiss information.

Cause submitted on briefs of Counsel.

Messrs. Logan & Child, for Appellants.

In support of the contention that the evidence is insufficient to justify the verdict, we cite the following cases: *State* v. *Keeland,* 39 Mont. 506, 104 Pac. 513; *State* v. *Mullins,* 55 Mont. 95, 173 Pac. 788; *Territory* v. *Doyle,* 7 Mont. 245, 14 Pac. 671; *State* v. *Sullivan,* 9 Mont. 174, 22 Pac. 1083; *State* v. *Willette,* 46 Mont. 326, 127 Pac. 1013; *State* v. *Brower,* 55 Mont. 349, 177 Pac. 241; *Sanders* v. *State,* 167 Ala. 85, 28 L. R. A. (n. s.) 536, 52 South. 417; *State* v. *Morey,* 2 Wis. 494, 60 Am. Dec. 439; *State* v. *Loomis,* 129 Iowa, 141, 105 N. W. 397; *State* v. *Cardelli,* 19 Nev. 319, 10 Pac. 433; 17 R. C. L. 63, 64.

Mr. S. C. Ford, Attorney General, and *Mr. Frank Woody* and *Mr. Carl E. Cameron,* Assistant Attorneys General, for Respondent.

MR. COMMISSIONER SPENCER prepared the opinion for the court.

Defendants were charged in the district court of Flathead county with the larceny of one steer calf, the property of A. M. Moore. Trial was had and defendants convicted. Motions in arrest of judgment and for a new trial were denied. Defendants appeal from the adverse order in each instance and from the judgment.

It appears from the evidence that about June 29, 1917, the defendants went through Niarada, in Flathead county, traveling north through the Little Bitter Root Canyon, upon a fishing excursion. They were seen going and returning. Over a considerable portion of the territory lying between Niarada and Marion, through which defendants traveled, and particularly near what is known as Lang's Hill, many head of cattle

grazed, nearly all of which belonged to A. M. Moore. On July 3, 1917, Charles Carlson was driving a herd of Moore's cattle toward the home ranch situated about six or seven miles south of Marion, when he discovered a few rods from the road, the hide and part of the entrails of a calf recently butchered. The hide still had portions of all four legs and "considerable bone" attached, but the head missing and a hole in the side, apparently from removal of the brand. The age of the calf was less than a year—what is called a "short yearling." This hide was taken to A. M. Moore's and turned over to the deputy sheriff, who retained possession until trial. Moore identified the hide as that of one of his calves. On July 3, the condition of the hide indicated that the animal had been recently killed. On July 8, the deputy sheriff of Flathead county, armed with a search-warrant, went to defendant Schrack's place "looking for veal." He found in a keg in the roothouse some "veal" and removed and took with him a portion—"what I figured a piece of the left shoulder." Upon the trial this piece of the shoulder and the hide were exhibits in the case. On July 8, when defendant Schrack's place was searched, conversation was had between defendant and wife and the deputy sheriff as to the ownership of the veal found in the roothouse and the circumstances under which it was killed, as well as the disposition made of the hide and part of the meat. Other conversations with defendant Schrack developed inconsistent statements about the same subject matter, but in none of his conversations, either with the deputy sheriff or others, was the larceny of the animal in question discussed, except to the extent that defendant denied killing any calves or cattle upon his trip up and return from the Bitter Root Canyon. Upon the trial, witness Martin, deputy sheriff, produced the "piece of shoulder" and "the piece with the hoof on" (part of the hide), and the following appears in the record: "Q. You may show the jury which one of those pieces is the piece you got from Schrack. A. This one [indicating]. I didn't saw it off. Q. It was sawed off, all

right. Show them the other part of the exhibit. Place the two together. [Witness puts the two pieces together.] By Mr. McDonald: The piece with the hoof on, is the one piece. The other piece, the piece he got at Schrack's." There is no testimony to show whether the two pieces fit or not.

The evidence discloses further that about July 6 or 7, 1917, in a conversation between witness Joe Shilts and defendant Schrack, the defendant made the following statement: "This time they got me for killing a steer instead of a deer, and I will leave it go at that, and it will only cost me $40." And the day previous to the trial defendant Schrack said to the same witness: "Well, all I told you, that they had me for killing a steer instead of a deer."

The foregoing epitome views the evidence in the light most unfavorable to the defendant Schrack.

Defendant Rogers accompanied Schrack on the trip to the Bitter Root and return. In addition to this fact, witness Martin testified that defendant Schrack told him they used Schrack's team and Rogers' wagon, from which we conclude there is no evidence to justify a suspicion of his guilt, must less his conviction.

The state sought and secured conviction entirely upon **[1, 2]** circumstantial evidence. The approved rule in such cases is that "Where a conviction is sought upon circumstantial evidence, the criminatory circumstances proved must be consistent with each other, and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis." (*State* v. *Slothower*, 56 Mont. 230, 182 Pac. 270; *State* v. *Woods*, 54 Mont. 193, 169 Pac. 39.)

Having in mind this rule, together with the further declaration so long recognized by this court that "mere suspicions or probabilities, however strong, are not sufficient basis for a conviction" (*State* v. *Brower*, 55 Mont. 349, 177 Pac. 241; *State* v. *Sieff*, 54 Mont. 165, 168 Pac. 524; *State* v. *McCarthy*, 36 Mont. 226, 92 Pac. 521), we conclude that the testimony sup-

ports nothing more than the merest suspicion of defendant Schrack's guilt, and warrants less as to defendant Rogers. Removing from the record the evidence of the deputy sheriff, who produced "the part of the shoulder" and "the part of the hide with the hoof on," the trial is void of even suspicion against Schrack.

In view of the foregoing, we think consideration of other assignments unnecessary and deem the evidence insufficient to justify a conviction, and recommend that the judgment and order appealed from be reversed and the cause remanded, with directions to the court below to dismiss the information.

PER CURIAM: For the reasons given in the foregoing opinion, it is ordered that the judgment and order of the lower court be reversed, and the cause remanded, with directions to dismiss the information.

Reversed.

HOELLER, RESPONDENT *v.* MOOG ET AL., APPELLANTS.

(No. 4,370.)

(Submitted April 20, 1921. Decided May 16, 1921.)

[198 Pac. 367.]

Chattel Mortgages—Conditional Sale Contracts—Recordation—Assignment—Record on Appeal.

Record on Appeal—Defects—Duty of Counsel.

1. It is incumbent upon counsel to so prepare the record on appeal as to present the full merits of their contentions and thus enable the court to review them with intelligence without having to indulge in speculations, and to this end avoid endless repetition in pleadings, clerical inaccuracies and errors in the evidence, or the incorporation of testimony referring to exhibits not in the record, and of exhibits referred to in neither pleadings nor proof.

Chattel Mortgages—Conditional Sale Contracts—Recordation—Assignment—Rights of Assignee of *Bona Fide* Mortgagee.

2. Where a chattel mortgage, executed by the purchaser of the property under a conditional sale contract, was filed for record prior to the recordation of the contract, it was as valid in the hands of the

[60 Mont. 74.]

assignee of the mortgage as it was in those of the *bona fide* mortgagee for value and without notice, even though the assignee may have had actual notice of the existence of the conditional contract of sale at the time of the assignment.

Same—Conditional Sales—Right of Purchaser to Mortgage Property.

3. The purchaser of personal property under a conditional sale contract whereby title was reserved in the seller until full payment made had a mortgageable interest in it (section 5757, Rev. Codes, as amended, Laws 1913, Chap. 86).

Appeals from District Court, Hill County; W. B. Rhoades, Judge.

ACTION by Anna Hoeller against John A. Moog and others. From a judgment for plaintiff, and from an order denying their motion for new trial, defendants appeal. Reversed.

Mr. H. S. Kline and *Mr. C. B. Elwell,* for Appellants, submitted a brief; *Mr. C. B. Elwell* argued the cause orally.

The original mortgagee, the Chester State Bank, being a *bona fide* holder of the mortgage without notice, any subsequent holder of such mortgage claiming through it, whether with or without notice, was in the same position as the Chester State Bank, and his title was just as good and free from attack as the title of the Chester State Bank. In other words, once the instrument in question passes into the hands of a *bona fide* holder without notice, it makes no difference how many prior or subsequent holders have had notice, the mortgage or other instrument has been purged of all taint, and the holder is entitled to rely upon the incontestability of the right of any prior holder through whom he traces his title. It is not easy to find numerous cases to support this as applied to conditional sales agreement, but we find other cases supporting the same theory as applied to the filing of chattel mortgages, and the rights of innocent third parties acquiring rights to the chattels, where the mortgage is unrecorded. We do not think that there can be any question but that the purposes of filing a conditional sale agreement and a chattel mortgage are the same. In both cases the possession is in one party, and an interest remaining in the

other, and it is for the purpose of protecting innocent third parties who might deal with the party in possession that the recording or filing is made necessary. (*McKnight* v. *Gordon*, 32 Rich. Eq. (S. C.) 222, 94 Am. Dec. 164; *Tyler* v. *Safford*, 31 Kan. 608, 3 Pac. 333; *Hawkins* v. *Western National Bank of Hereford* (Tex. Civ.), 146 S. W. 1191; *John Caplice Co.* v. *Beauchamp*, 22 Mont. 258, 56 Pac. 278; *National Cash Register Co.* v. *Maloney*, 95 Iowa, 573, 64 N. W. 618; *Herring* v. *Cannon*, 21 S. C. 212, 53 Am. Rep. 661.)

It would be possible to quote almost indefinitely from this line of decisions, all to the same effect, some where the original purchaser was *bona fide* and subsequent purchaser had notice, and others where the original purchaser or mortgagee had notice and the subsequent purchaser had no notice. In the first case the holder is entitled to protection by reason of the good title of the party through whom he must trace his title, and in the second instance he is entitled to protection by reason of his own *bona fides*.

Mr. Frank N. Utter, for Respondent, submitted a brief and argued the cause orally.

In 35 Cyc. 682, it is stated concerning the protection afforded by a recording statute for conditional contracts of sale, "but even the statute will not protect subsequent purchasers or creditors with actual notice." In *Jones* v. *Clark*, 20 Colo. 353, 38 Pac. 371, the court quoted from Judge Bradley in *Harkness* v. *Russell*, 118 U. S. 663, 30 L. Ed. 285, 7 Sup. Ct. Rep. 51 [see, also, Rose's U. S. Notes]: "It is only necessary to add that there is nothing either in the statute or adjudged law of Idaho to prevent in this case the operation of the general rule, which we consider to be established by overwhelming authority, namely, that in the absence of fraud, an agreement for a conditional sale is good and valid, as well against third persons as against the parties to the transaction."

The same court in a case decided in April, 1916, *Money-weight Scale Co.* v. *Hale-Halsell Groc. Co.*, 57 Okl. 135, 156 Pac. 1187, under a recording law passed in 1910, rendering a contract of conditional sale void, as against creditors and others, if not filed, said: "It is the opinion of this court that, although the conditional sale contract was not recorded at the time of the attachment, yet if defendant, prior to the levy of the attachment, had actual notice that the title to the scale was retained by the vendor until the purchase price was paid in full, failure to record cannot be taken advantage of by them, they having had actual knowledge of such contract." (See, also, *National Bank of Larned* v. *Tufts*, 53 Kan. 710, 37 Pac. 127; *Crumrine* v. *Reynolds*, 13 Wyo. 111, 78 Pac. 402; *Morton* v. *Frick Co.*, 87 Ga. 230, 13 S. E. 463; *Hill* v. *Luden & Bates Southern Music House*, 113 Ga. 320, 38 S. E. 752; *Thompson* v. *Duff*, 19 Ill. App. 75; *Allen* v. *McCalla*, 25 Iowa, 464, 96 Am. Dec. 56.)

It should be noted that there is a clear distinction in this state between the title of the owner of property in his possession subject to an unrecorded chattel mortgage, and the holder of property as vendee under an uncompleted conditional sale contract. In the one case the holder has an absolute title subject to be taken away by foreclosure. In the other, the holder has no title whatever that he can convey, except equitable interests, and the recording laws in such cases are not for the purpose of conveying title but merely to protect those, who in reliance upon the presumption of ownership from such possession deal with him in ignorance of the true title.

The case of *John Caplice Co.* v. *Beauchamp*, 22 Mont. 258, 56 Pac. 278, is against appellants' contention. In speaking of the rights of a subsequent purchaser as opposed to an unrecorded chattel mortgage, the court says: "Indeed, before the new Codes of 1895 went into effect, he would have been protected, even if he had had the knowledge that Neson had mortgaged the property, because the mortgage had not been filed

as required by law. (*Milburn Mfg. Co.* v. *Johnson*, 9 Mont. 537, 24 Pac. 17.) That rule would not obtain now, though, for under Civil Code of 1895, section 3861, good faith is essential on the part of a subsequent purchaser and encumbrancer of personal property mortgaged who assails the validity of a prior mortgage as against his rights." The foregoing holding is directly against the citations made by appellants of decisions from other states concerning the rights of subsequent purchaser as opposed to unrecorded chattel mortgages.

MR. COMMISSIONER SPENCER prepared the opinion for the court.

This is an action to enjoin the sale of a hotel building at Inverness, Hill county, Montana, under mortgage foreclosure. Defendants have appealed from an adverse judgment and order denying their motion for a new trial.

As a reversal must be had herein, it is worthy of note that [1] the pleadings upon which this action was predicated are replete with a useless and almost endless line of repetitions; that the printed transcript contains many clerical errors and inaccuracies in the evidence, and presents evidence so vague and incomplete as to preclude a satisfactory conclusion by this court. Testimony was received as to exhibits which do not appear in the record, such as Plaintiff's Exhibit "H," while other exhibits appear which were referred to neither in the pleadings nor proof, such as Defendants' Exhibit 4. We find the record encumbered by Plaintiff's Exhibit "D," a mortgage from Gesche to Foorman in 1912, Exhibit "E," power of attorney, Foorman to Baatz, and Exhibit "F," promissory note, Gesche to Foorman, to secure which Exhibit "D" was executed, all of which, so far as the evidence discloses, are wholly immaterial, and neither tend to prove nor disprove any of the issues material upon the trial, while Plaintiff's Exhibit "I" appears to be incompetent for any purpose. We think we may, with propriety, call attention of counsel to their duty

to clients and the court, to present the full merits of their contentions and preserve the record so that this court, if called upon, may review them with intelligence, and not be required to delve into the realms of speculation.

The record before us is wholly unsatisfactory, but we believe [2] the pleadings and proof disclose the following facts to be incontestable: That upon December 20, 1913, Amanda L. Gesche was the owner of a two-story, frame hotel building situated in the town site of Inverness, Hill county, Montana; that upon the same date she sold said hotel building to Amelia Wyant upon what is commonly called a conditional sales contract, reserving in herself, however, title to said hotel building until finally paid for, according to the terms of said contract; that upon December 27, 1913, Amelia Wyant and her husband, A. L. Wyant, mortgaged said hotel building to the Chester State Bank of Chester, Montana, to secure the loan of a sum of money, represented by a note of even date with said mortgage; that upon January 8, 1914, the mortgage was filed for record in the office of the clerk and recorder of Hill county; that upon April 12, 1914, Amanda L. Gesche sold and assigned to this plaintiff, Anna Hoeller, all of her right, title and interest in and to the conditional contract of sale before mentioned; that upon April 15, 1914, the conditional contract of sale was filed for record in the office of the clerk and recorder of Hill county; that upon April 25, 1914, the assignment of said contract was likewise filed for record, and that subsequently, on April 30, 1914, the chattel mortgage to the Chester State Bank was assigned to the defendants, Moog, Carver and Barringer, and that they are now the owners and holders of the same. All parties to this action have treated the building in controversy as personal property, and the record is silent as to who owns the realty upon which it stands.

Appellants assign five specifications of error, but in disposing of the questions involved in these appeals, we think it only necessary to consider assignment No. 4, which is as follows:

"Error in holding that at the time Amelia Wyant and A. L. Wyant gave their mortgage to the Chester State Bank they had no interest in the Hotel Inverness which they could mortgage, and that the Hotel Inverness never became subject to that mortgage."

The question primarily material herein is: What right, if any, did the Chester State Bank acquire by virtue of its mortgage from Amelia Wyant and husband under date of December 27, 1913?

Chapter 86, Laws of the Thirteenth Session, page 378, reenacts section 5757, Revised Codes, and provides: "Any interest in personal property which is capable of being transferred may be mortgaged"—so that, if the Chester State Bank was a *bona fide* mortgagee prior to the filing for record of the conditional contract of sale from Amanda L. Gesche to Amelia Wyant, its rights became fixed under the provisions of section 5092, Revised Codes, as amended by Chapter 52, Session Laws of 1911, as follows: "All contracts, notes and instruments for the transfer or sale of personal property, where the title is stipulated to remain in the vendor until the payment of the purchase price or some part thereof, shall be in writing, and the original or true copy thereof, certified by the county clerk and recorder, shall be filed with the county clerk and recorder of the county wherein the property is situated; otherwise, any such contract, note or instrument is void as to *bona fide* purchasers, mortgagees, or attaching creditors of such property prior to such filing." (*Cuerth* v. *Arbogast*, 48 Mont. 209, 136 Pac. 383.) And likewise its assignees, the defendants herein, occupied the same position as the Chester State Bank, and were entitled to the same rights and immunities which said bank acquired, which seems to preclude any argument as to the rights of the Chester State Bank, if in fact it is a *bona fide* mortgagee for value and without notice.

The testimony of J. O. Berglin, cashier of the Chester State Bank, is the only evidence in the record pertaining to

the *bona fides* of the said bank mortgagee, and in so far as his evidence is of any probative value, it does tend to show that the Chester State Bank is a holder of the mortgage in good faith for value and without notice. If the Chester State Bank was a mortgagee in good faith, and its mortgage was filed prior to the filing of the conditional contract of sale, it then had a vested right and ownership (Rev. Codes, sec. 5092, as amended, *supra*), of which it could not be divested except by voluntary act on its part, or by operation of law through the statute of limitations, and hence it could sell or assign its rights to third persons who would occupy the same position and succeed to the same rights as the bank itself.

The complaint charges that the mortgage to the Chester State Bank was taken in the name of said bank as mortgagee, but for the use and benefit of these defendants. The evidence does not support this allegation. The court made no finding as to the rights acquired by the Chester State Bank under its mortgage, but it did find that between December 20, 1913, and December 27, 1913, the date of the mortgage, the defendants had actual notice of the existence of the conditional contract of sale between Amanda L. Gesche and Amelia Wyant, and that Amanda L. Gesche was the owner of the hotel building in controversy, and upon this finding based its judgment that the mortgage to the Chester State Bank was of no effect and void as to this plaintiff. We think this was error.

It would be an anomaly in the law to say that the bank had rights as a *bona fide* mortgagee, but that it lost those rights and lost its *bona fides* upon assignment of its mortgage, even though defendants may have possessed actual knowledge of the existence of the conditional contract of sale. Even under the doctrine of implied findings approved in this state (*Crosby* v. *Robbins*, 56 Mont. 179, 182 Pac. 122), to be consistent with its express findings, and to support its judgment, the court must have impliedly found the Chester State Bank had knowledge of the title of the plaintiff in the building in controversy at

the time it accepted its mortgage from Amelia Wyant, but such implied finding would be wholly unwarranted under the [3] proof. Amelia Wyant held a mortgageable interest in the property, but upon the record as a whole we think a retrial should be had, and recommend that the judgment and order denying a new trial be reversed, with directions to grant a new trial.

PER CURIAM: For the reasons given in the foregoing opinion it is ordered that the judgment and order denying a new trial be reversed, with directions to grant a new trial.

Reversed.

TERRY, RESPONDENT, *v.* STEPHENS, APPELLANT.

(No. 4,375.)

(Submitted April 20, 1921. Decided May 16, 1921.)

[198 Pac. 360.]

Real Property—Brokers—Fraud—Evidence—Insufficiency.

1. In an action against a real estate broker to recover secret profits claimed to have been made by him in a transaction resulting in an exchange of plaintiff's land for that of the purchaser, plaintiff paying to the purchaser the difference between the price set upon his (plaintiff's) land and that taken over by him in exchange, evidence *held* not to sustain a charge of fraud or misrepresentation on the part of the broker as to the value of the land received by plaintiff in exchange, it appearing that plaintiff was an experienced farmer thoroughly conversant with ranch property, had inspected the land before consummating the deal and taken possession, apparently satisfied with his bargain until he learned that the land taken over by him in exchange had been procured by defendant at a less price than he (plaintiff) was required to pay to its owner, no proof of the value of either property having been introduced.

Appeal from District Court, Missoula County; Asa L. Duncan, Judge.

---

1. For authorities passing on the question of right of principal to recover from broker or other agent commissions which latter received from other party to the contract, see notes in 1 Ann. Cas. 573; Ann. Cas. 1917A, 511; 28 L. R. A. (n. s.) 952.

[60 Mont. 82.]

ACTION by D. S. Terry against Allen Stephens and another. From a judgment for plaintiff, and from an order denying his motion for new trial, Stephens appeals. Reversed, and cause remanded with directions to enter judgment for defendant.

Messrs. Murphy & Whitlock, for Appellant, submitted a brief; *Mr. A. N. Whitlock* argued the cause orally.

Mr. Harry H. Parsons and *Mr. Thomas N. Marlowe,* for Respondent, submitted a brief; *Mr. Marlowe* argued the cause orally.

MR. COMMISSIONER JACKSON prepared the opinion for the court.

Plaintiff alleges in substance that he owned certain property at Paradise, Montana; that W. H. Montgomery & Co. owned 150 acres of land in the Flint Creek district; that defendants were real estate agents and brokers in Missoula, Montana; that in May, 1913, plaintiff obtained the services of the defendants as agents or brokers to sell or exchange his property, agreeing to pay defendants five per cent of the purchase or exchange price, which was set at $3,800; that subsequently the defendants notified plaintiff that they had listed with them the Montgomery land at a price of not less than $7,800, which figure was low and the market price for it, and that in obtaining title thereto the plaintiff's title to his lands would be credited in the sum of $3,800, leaving a balance due to W. H. Montgomery & Co. on the exchange of $4,000; that the defendants represented to the plaintiff that the price of the Montgomery land was so low that Montgomery would pay no commission, and before the sale could be consummated, plaintiff would have to pay defendants the entire commission; that plaintiff accepted the proposition and offer, and did pay to defendants the sum of $430 as commission; that plaintiff relied implicitly on the representations of defendants, and that he was not acquainted with the market and actual value of the Flint Creek lands, and

the representations were made by the defendants with the object and intent that they should be believed and relied on by plaintiff; that, so believing and relying, plaintiff conveyed title to his lands to the defendants for convenience, and at their request, and executed a written contract, under defendants' direction, with W. H. Montgomery & Co. to purchase the Flint Creek lands and pay a balance therefor of $3,700; that the representations and statements of defendants were false, and were known to be false by defendants when made, and were made in an unlawful attempt to profit in the transaction, and for the purpose of having plaintiff act on the same; that plaintiff believed them to be true and acted upon them; that the W. H. Montgomery Company received but $4,800 for their property, and this plaintiff was defrauded by the defendants of $3,000, which defendants kept, converted to their own use, and defrauded the plaintiff thereof. Then it is alleged that the fraud herein was not discovered until March, 1915, when plaintiff, conferring with Montgomery, discovered what the company had received for the Flint Creek property, and that defendants while acting as his agents, charged him a commission on one hand, and made a wrongful and illegal profit on the other. Plaintiff prayed judgment in the sum of $3,000. The defendant Hooverson was not served and did not appear. The answer of defendant Stephens denies the allegations of plaintiff, except the execution of the contract between W. H. Montgomery & Co. and the plaintiff, and by way of affirmative defense pleads the statute of limitations (subd. 4, sec. 6449, Rev. Codes) and the statute of frauds. The reply is a denial of the affirmative defense and by estoppel. A trial was had to a jury. Defendant's motions for nonsuit and directed verdict were denied, and verdict returned for the plaintiff in the sum of $3,000. Defendant appealed from the judgment and the order denying a new trial.

Fourteen specifications of error are set out. It is not necessary to consider any of them, except those bearing on the action

of the court in denying defendant Stephens' motions for nonsuit and directed verdict, as reversal is made imperative by plaintiff's own case.

Plaintiff's case showed that he owned the Paradise property, [1] and desired to dispose of it by sale or trade, and through the defendants went to look at some land in the Flint Creek district at $55 per acre, which plaintiff did not like, and some at $52 per acre, which he did like; that plaintiff, an experienced rancher for fifteen or eighteen years, "thoroughly familiar with ranching and ranch property in this section of the country," went over and across the $52 land he subsequently bought, examined it as much as he cared to, satisfied himself, then came back to Missoula and concluded the deal. Plaintiff says: "I was satisfied with the arrangement that was proposed." He then deeded his Paradise property to Hooverson and Stephens, and was credited therefor in the sum of $3,800. With respect to this he testified: "It didn't make any difference to me whether the proceeds of this property were turned over to the Montgomery people or kept by Hooverson and Stephens. I had made my bargain and turned over my property and received a contract to the Flint Creek Valley land. I had a contract to pay $3,700, and I carried out that contract and lived on the Flint Creek property." He then signed the contract, obligating himself to pay to W. H. Montgomery & Co. $3,700, the balance of the price he agreed to pay for 150 acres of Flint Creek Valley land at $52 per acre, less $300. The deposition of W. H. Montgomery, introduced in plaintiff's case, shows that the Montgomery Company had a contract with Hooverson to accept for the Flint Creek land the sum of $4,800, subject to a commission of $500, and that it was immaterial to the company what the land sold for; that "so far as we were concerned he was at liberty to sell at any price, and net to us the amount agreed upon." Plaintiff paid to Stephens, or to Hooverson and Stephens, the sum of $430 as commission for the sale price on both properties, $300 of which was on the Mont-

gomery purchase price, which sum was deducted from $7,800, and $130 on his own. Some time after the first payment set out in the contract between W. H. Montgomery & Co. and plaintiff, he discovered that the company had received the price testified to by W. H. Montgomery. He had already moved on the land, and apparently was satisfied with his bargain until this time.

This is, in effect, the plaintiff's case, and under no conceivable theory did he sustain the allegations of his complaint. He offered no proof of the value of either of the pieces of property, and nowhere does it appear what Montgomery's price was, but all of the negotiations had to do with the trade price between plaintiff and defendants. This cannot be construed as fraud or misrepresentation, in view of plaintiff's testimony that he was satisfied with his bargain. (*Butte Hardware Co.* v. *Knox,* 28 Mont. 111, 72 Pac. 301; *Grinrod* v. *Anglo-American Bond Co.,* 34 Mont. 169; 85 Pac. 891.)

Plaintiff is conclusively shown by his own case to have dealt with the defendant at arm's-length, relying upon his own judgment. The motion for a nonsuit should have been granted. Stephens' case does not help plaintiff in any particular, but goes to explain the business relations between the defendants and plaintiff, with respect to the exchange, and the court erred in denying the motion for a directed verdict.

Because of the foregoing reasons, we recommend that the judgment and order denying the motion for a new trial be reversed, and that the cause be remanded to the district court, with directions to set aside the verdict and judgment for the plaintiff, and to enter judgment for defendant for his costs.

PER CURIAM: For the reasons given in the foregoing opinion, it is ordered that the judgment and order of the lower court be reversed and the cause remanded, with directions to set aside the verdict and judgment for the plaintiff and to enter judgment for defendant for his costs.

Reversed and remanded.

DONOVAN, RESPONDENT, *v.* BULL MOUNTAIN TRADING CO., APPELLANT.

(No. 4,364.)

(Submitted April 19, 1921. Decided May 16, 1921.)

[198 Pac. 436.]

Oral Contracts—Work and Labor—Indefiniteness—Quantum Meruit—Special Contract—Measure of Recovery.

Oral Contracts—Work and Labor—Complaint—Insufficiency.

1. The complaint in an action to recover compensation for extra services performed, which fails to state any time or basis for computing the claim, is indefinite.

Same—When Void for Indefiniteness.

2. An agreement, verbal or written, to be binding, must be sufficiently definite to enable the court to fix an exact meaning upon it, and if it is so vague and indefinite as to make it impossible to collect from it the full intention of the parties, it is void.

Same—Work and Labor—Extra Compensation—Void for Indefiniteness.

3. *Held*, under the above rule (paragraph 2) that an oral statement alleged by plaintiff to have been made to him by the president of a mercantile establishment that there would be "no limit" to his salary, but that it was to be "commensurate with the earnings" of the company, was too indefinite to constitute a contract for compensation for services in addition to his regular salary.

Same—*Quantum Meruit*—Special Contract—Measure of Recovery.

4. Where recovery is sought on *quantum meruit* and the evidence reveals a special contract, the measure of recovery must be limited to the amount so specified.

Appeal from District Court, Musselshell County; George P. Jones, Judge.

ACTION by J. J. Donovan against the Bull Mountain Trading Company. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Reversed and cause remanded with directions to enter judgment for defendant.

Cause submitted on briefs of Counsel.

Mr. Thomas J. Matthews, for Appellant.

In order that an executory contract may be enforceable, it is generally necessary that the price must be certain of being

ascertained from the contract itself, and yet it is not necessary that the exact figures be stated; nevertheless, the price must by the terms of the contract be capable of being definitely ascertained. (6 R. C. L. 648; *United Press* v. *New York Press Co.*, 164 N. Y. 406, 53 L. R. A. 288 and note, 58 N. E. 527; see, also, *Bluemner* v. *Garvin*, 120 App. Div. 29, 104 N. Y. Supp. 1009.) In the last case cited, the defendant desired to obtain an appointment as architect for a public building in New York, but being unable to prepare plans acceptable to the Municipal Art Commission, requested the plaintiff to make a successful plan and agreed if he did, and if defendant should get the appointment, to give plaintiff a fair share of his commissions. The contract did not fix the amount of the commissions. The plaintiff drew plans which were accepted, after which defendant repudiated the arrangement. The court held that the terms of the agreement were too vague to constitute an express contract for services. Appellant contends that this case, in so far as the principles involved are concerned, is substantially the proposition before the court in the case at bar, and that the allegations of the complaint are too indefinite and uncertain to form the basis of an action, or to constitute an express contract for extra compensation. (*Petze* v. *Morse Dry Dock & Repair Co.*, 125 App. Div. 267, 109 N. Y. Supp. 328; affirmed in 195 N. Y. 584, 89 N. E. 1110.) Likewise in *Varney* v. *Ditmars*, 217 N. Y. 223, Ann. Cas. 1916B, 758, 111 N. E. 822, the court held that an executory contract by an employer to pay his employee in addition to his salary a fair share of the profits is too indefinite to support recovery. (Affirming s. c., 159 App. Div. 911; see, also, *MacIntosh* v. *Kimball*, 101 App. Div. 494, 92 N. Y. Supp. 132; *Fairplay School Tp.* v. *O'Neal*, 127 Ind. 95, 26 N. E. 686; *Dayton* v. *Stone*, 111 Mich. 196, 69 N. W. 515; *Adams* v. *Adams*, 26 Ala. 272; *Van Slyke* v. *Broadway Ins. Co.*, 115 Cal. 644, 47 Pac. 689, 928; *Marble* v. *Standard Oil Co.*, 169 Mass. 553, 48 N. E. 783; *Burks* v. *Stam*, 65 Mo. App. 455; *Butler* v. *Kemmerer*, 218 Pa. St. 242, 67 Atl. 332.)

Mr. John R. Boarman, for Respondent.

The contention of appellant is that the language used is altogether too uncertain and speculative to constitute a binding and enforceable contract. The objection was waived by not demurring to the complaint on the grounds of ambiguity and uncertainty. (Rev. Codes, sec. 6534, subd. 7; *Hefferlin* v. *Karlman*, 29 Mont. 150, 74 Pac. 201.)

The complaint states that, in addition to the salary, an extra reasonable compensation, liberally commensurate with the results obtained would be allowed. What that reasonable compensation should be was properly left to the jury to say under the evidence introduced upon the trial.

Counsel seem to have overlooked the broad distinction between an executory contract and an executed one. The testimony shows that the terms of the contract were for one year and that respondent had fully performed the conditions thereof.

In support of the contention of counsel he cites, 6 R. C. L., page 648, which states: "That in order that an executory contract may be enforceable, it is generally necessary that the price must be certain of being ascertained from the contract itself, and yet it is not necessary that the exact figures be stated; the price must by the terms of the contract be capable of being definitely ascertained." The text cited several authorities which are not applicable to the facts in this case, nor to the allegations of the complaint when it is considered that this is an executed contract, for in the same authority it is held: "However, after services or materials have been furnished and accepted, the fact that no price had been agreed upon, or that the compensation mentioned in the contract is too indefinite, does not prevent the recovery of a reasonable compensation." (Page 649.)

The authorities cited by counsel all refer to cases in which the contract had not been fully performed and are not applicable to an executed contract as in the instant case.

The case of *Varney* v. *Ditmars*, 217 N. Y. 223, Ann. Cas. 1916B, 758, 111 N. E. 822, cited by appellant, is one brought for a wrongful discharge, and damages were claimed for a time subsequent to the discharge for a "fair share of the profits." The court held that: "An executory contract by an employer to pay an employee in addition to his salary, a fair share of the profits is too indefinite to support a recovery." In the notes to this case is stated the rule in the *United Press Case*, 164 N. Y. 406, 53 L. R. A. 288, 58 N. E. 527; 6 R. C. L. 644: "The rule stated does not prevent a recovery upon *quantum meruit*, in case one party to an alleged contract has performed in reliance upon the terms thereof, vague, indefinite and uncertain though they are." In such case the law will presume a promise to pay the reasonable value for the services.

Judge Gray said: "I entertain no doubt that, where work has been done or articles have been furnished, a recovery may be based upon *quantum meruit*, or *quantum valebat*."

MR. CHIEF COMMISSIONER POORMAN prepared the opinion for the court.

Appeal by defendant from a judgment entered against it on a verdict for plaintiff, and also from an order overruling defendant's motion for a new trial. The action, as appears from the amended complaint, is to recover extra compensation for services alleged to have been rendered by plaintiff for defendant. Defendant was engaged in general merchandise business at Klein, Montana, which, under the then management, was "losing money rapidly." It is further alleged in the amended complaint: "The defendant promised to pay plaintiff if the [1] latter would take charge of said merchandise business * * * as manager thereof, and would conduct the same at a salary of $175 per month, and in the event that the plaintiff was successful in placing said business upon a profitable basis and rescuing the said business from the deplorable and desperately unprofitable condition in which the said business

then was and had been for a long time, the defendant promised to pay plaintiff, in addition to the said salary, an extra and reasonable compensation, liberally commensurate with the results obtained; that this plaintiff, in reliance upon the said promises and acting thereon, accepted said offer of employment on the seventeenth day of August, 1915, * * * and continued in the said employment of defendant as such manager of said business up to the first day of September, 1916." It is further alleged: "That plaintiff succeeded in placing said business upon a profitable basis and rescued it from the unprofitable condition in which it then was." It is further alleged that the fair and reasonable value for the extra compensation due the plaintiff is the sum of $5,000, and that $500 of this sum has been paid.

Defendant filed a general demurrer to this amended complaint, which demurrer was afterward withdrawn and answer made, admitting certain allegations of the amended complaint, admitting the payment of the $500 extra, but denying any contract with Donovan except that relating to the $175 per month. A replication to this answer was filed. No other objection was made to the amended complaint until at the trial the defendant objected to the introduction of any evidence, for the reason that "the amended complaint fails to state a cause of action against defendant."

1. The respondent here contends that the objection to the amended complaint came too late.

The fact that a party does not move or specially demur to the pleading of his adversary on the ground that it is indefinite does not obviate the necessity of the pleading stating a cause of action, if a complaint, or a defense, if an answer. In *Hefferlin* v. *Karlman*, 29 Mont. 139, 74 Pac. 201, cited by respondent, the objection to the pleading was made for the first time in the supreme court and the court held that the complaint did state a cause of action, and that the objection thus urged could not then be entertained.

In passing on this assignment of error, we go no further than to hold that the amended complaint is indefinite in not stating any basis or time of computing any claim for extra services. We believe that the rights of the parties may be better subserved by considering the actual contract as testified to by the plaintiff, and under which he claims to have accepted the employment and performed the services.

2. At the close of plaintiff's case, the defendant asked the court to direct a verdict in its favor for several reasons therein stated. All of these reasons, in the final analysis, are based upon the appellant's contention that the contract of employment is insufficient to support a finding for plaintiff. While confining our discussion to the legal question involved, a brief statement of the facts leading up to the employment may be helpful. It appears that the plaintiff was general manager of a store at Carpenter Creek, Montana, which was owned by plaintiff, H. S. Hopka, and this defendant; that the plaintiff was receiving a salary of $125 per month. The defendant was conducting a mercantile business at Klein, Montana, and, being dissatisfied with the management thereof, requested plaintiff to take charge as the general manager, which the plaintiff did, and continued in charge until he quit of his own volition at the time named in the amended complaint. The contract of employment was made with G. W. Megeath, [2] president of the defendant corporation. Plaintiff in his testimony, in stating the contract, says: "He told me he had been paying a salary of $200 per month to the man who preceded me. If I would take it at $175 per month and put the business on its feet, there would be no limit to my salary, and I agreed to take it on those terms. Q. What conditions were there upon which you should receive anything more than the $175 per month? (Objected to as leading and suggestive.) Court: He may answer. A. My salary was to be commensurate with the earnings of the company for the time I was there, and I agreed to take it for a year and try it. That

was the conditions of my employment." It further appears that the $175 per month had been regularly paid; that the only claim of plaintiff now is for the extra compensation.

The appellant contends that the language of this contract of employment is too uncertain and speculative to constitute a binding and enforceable agreement, in so far as it relates to extra compensation.

It is a necessary requirement that an agreement, in order to be binding, must be sufficiently definite to enable the court to fix an exact meaning upon it. If an offer contemplates an acceptance by merely an affirmative answer, the offer must itself contain all the terms necessary for the required definiteness.

In *Price* v. *Stipek*, 39 Mont. 426, 431, 104 Pac. 195, 196, this court quoted with approval from the decision in *Thomson* v. *Gortner*, 73 Md. 474, 21 Atl. 371, wherein it is said: "In order to constitute a valid verbal or written agreement, the parties must express themselves in such terms that it can be ascertained to a reasonable degree of certainty what they mean. And, if an agreement be so vague and indefinite that it is not possible to collect from it the full intention of the parties, it is void; for neither the court nor the jury can make an agreement for the parties. Such a contract can neither be enforced in equity, nor sued upon at law." This doctrine was again announced by this court in *Schwab* v. *McVey*, 54 Mont. 422, 171 Pac. 277. (See, also, *Ahlstrom* v. *Fitzpatrick*, 17 Mont. 295, 42 Pac. 757.)

In *Mackintosh* v. *Kimball*, 101 App. Div. 494, 92 N. Y. Supp. 132, the plaintiff sought to recover compensation in addition to a stated salary which he had received, upon a claim by him that during his employment he stated to defendants that he intended to quit unless given an increased salary, and one of the defendants said to him they would make it worth his while if he stayed on and would increase his salary, and that the idea was to give him an interest in the profits. The

defendant further remarked: "You can depend upon me. I will see that you get a satisfactory amount." The court held that the arrangement was too indefinite to form the basis of any obligation on the part of defendants.

In *Butler* v. *Kemmerer*, 218 Pa. 242, 67 Atl. 332, the plaintiff was in the employ of defendant at a regular salary, and the defendant promised him that if there were any profits in the business he would divide them with the plaintiff "upon a very liberal basis." The court held that the contract was never made complete and that there was no standard by which to measure the degree of liability and that the contract was too vague and indefinite to be enforced.

In *Fairplay School Township* v. *O'Neal*, 127 Ind. 95, 26 N. E. 686, a verbal contract by which the trustees agreed to pay a teacher "good wages," it was held that the contract was void for uncertainty as to compensation.

In *United Press* v. *New York Press Co.*, 164 N. Y. 406, 53 L. R. A. 288, 58 N. E. 527, a contract to pay "not exceeding $300 per week" was held void for uncertainty. The court said: "If this were a case where the contract of the parties was merely ambiguous in its terms, it might be permissible to explain them by evidence of their acts and thus to show a practical construction, but the difficulty with this instrument lies deeper. It lacked support in one of its essential elements; in the absence of a statement of the price to be paid * * * it is elementary in the law that, for the validity of a contract, the promise, or the agreement, of the parties to it must be certain and explicit and that their full intention may be ascertained to a reasonable degree of certainty." The court further held that certain payments made by the defendant of the additional compensation did not have the effect of giving validity to the contract.

In *Varney* v. *Ditmars*, 217 N. Y. 223, Ann. Cas. 1916B, 758, 111 N. E. 822, the plaintiff was an employee of the defendant, receiving a salary of $35 per week, and on complaint that his

salary was too small the defendant said: "I am going to give you $5 more a week; if you boys will go on and continue the way you have been and get me out of this trouble and get these jobs started * * * on the 1st of next January I will close my books and give you a fair share of my profits." The court held that these statements made by the defendant were too indefinite to constitute a contract, and discussed at considerable length the principles here involved and cited many authorities.

The respondent maintains that these New York cases do not apply, for the reason that the questions there involved a division of profits, while the instant case is for extra compensation. This is true in a sense, but the principle discussed by the New York court is applicable here.

The phrase "commensurate with the earnings of the company" would require the ascertainment of the profits and, in effect, their division.

There is no question that, in the case of a contract for the sale of goods or for hire without a fixed price or consideration being named, it will be presumed that a reasonable price or consideration is intended, and recovery may be based upon *quantum meruit* or *quantum valebat*, but even in such a case the contract alleged must be sufficiently definite to acquire a legal status; otherwise there is not any contract, either express or implied.

The contract in this case is definite and certain as to the [3] $175 per month, but the phrase therein "no limit to my salary" cannot be regarded as having been made with contractual intent, and the further phrase "commensurate with the earnings of the company" is equally indefinite. Neither furnish any rule nor contain any intimation as to the amount of the increase, nor how it is to be computed, or when it is to commence. All is left to conjecture. The parties having omitted these essential requirements, any increase or change in the compensation would have to be the subject of future agree-

ment or stipulation. Similar language in a contract was held by the supreme court of Massachusetts as being merely "hopeful encouragement sounding only in prophecy." (*Hall* v. *First Nat. Bank*, 173 Mass. 16, 73 Am. St. Rep. 255, 44 L. R. A. 319, 53 N. E. 154.)

Nor is the respondent's case strengthened if we regard the [4] statement "my salary was to be commensurate with the earnings of the company" as a separate or special contract, for, "where a recovery is sought as in *quantum meruit*, and the evidence reveals a special contract, the measure of recovery is to be limited to, or, in other words, must not exceed the amount specified in the contract." (*Swift* v. *Johnson*, 175 Mo. App. 660, 158 S. W. 96.) No amount is specified in this alleged contract, nor is there any statement therein by which any amount can be ascertained. This entire subject is discussed at length, with citation of cases and holdings of the court in 1 Williston on Contracts, section 36, and following sections: 1 Page on Contracts, first edition, section 27, and following sections; second edition, section 25, and following sections.

The contract stated by plaintiff in positive terms in his testimony, and on which he bases his claim for extra compensation, is so vague and indefinite as to be wholly void, and hence unenforceable in either law or equity.

We recommend that the judgment and order appealed from be reversed, and the cause remanded to the district court, with directions to set aside the verdict and judgment for plaintiff and to enter judgment for defendant for its costs.

PER CURIAM: For the reasons given in the foregoing opinion, it is ordered that the judgment and order of the lower court be reversed, and the cause remanded with directions to set aside the verdict and judgment for plaintiff and to enter judgment for defendant for its costs.

Reversed.

LEHMAN, APPELLANT, v. SUTTER ET AL., RESPONDENTS.

(No. 4,328.)

(Submitted April 12, 1921. Decided May 23, 1921.)

[198 Pac. 1100.]

Mines and Mining Claims—Adverse Claim—Location—Relocation—Abandonment—Annual Assessment Work.

Mines and Mining Claims—Adverse Claim—Complaint.

1. In an action to determine an adverse claim to a lode mining claim, the complaint is sufficient if plaintiff by appropriate allegations shows his right to the ground covered by his location, without alleging the nature of defendant's claim, the duty of doing so devolving upon defendant.

Same — Complaint — Location — Defect in Recorded Certificate—Immaterial Allegation.

2. In view of the provision of section 2293, Revised Codes, that defects in a recorded certificate of location of a mining claim shall not be deemed material where the person relying on the defects made his location with notice thereof, allegations in his complaint, in an action to determine an adverse claim, relating to such defects are immaterial.

Same—When Land not Subject to Location.

3. Mining ground covered by valid and subsisting locations is not public domain and therefore not open to exploration and purchase under the federal statute.

Same—Location Within Subsisting Claim Void.

4. An attempted location of a mining claim, based upon a discovery within a then valid and subsisting claim, is void for the purpose of laying the foundation for an adverse claim, and does not attach upon the subsequent failure of the first locator to do the required annual assessment work.

Same—Failure to Do Assessment Work—Effect.

5. A location of a mining claim upon ground covered by a valid and subsisting claim, at a time when the senior locator is not in default under state or federal laws, is subordinate to a relocation by a stranger made after the rights of the first locator lapsed because of failure to do the annual assessment work.

Same—Relocation by Owner—When Valid.

6. Under section 2289, Revised Codes, the locator or claimant may at any time relocate his own claim for any purpose other than to avoid the doing of the annual assessment work, provided he complies in all respects with the requirements of sections 2283, 2284 and 2286, Revised Codes.

[60 Mont. 97.]

Same—Abandonment—Rights of Nonconsenting Cotenant.

7. Where three of four cotenants of mining claims abandoned them by relocating other claims covering the same ground, the rights of the fourth remained unaffected by their abandonment and, therefore, as to the latter the claims thus abandoned remained valid and subsisting claims until forfeited.

Same—Assessment Work—Preserves Claimant's Right, Until When.

8. Representation work done on a mining claim during any one year is sufficient to preserve the claimant's right until the 31st of December of the next year.

Same—Relocation by Owner—When Ineffectual.

9. Where relocators of their own claims did not do the excavation work required to be done, under section 2289, Revised Codes, before another had located the same ground, their attempted relocations were nugatory.

Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

ACTION by Oswald Lehman against Julian A. Sutter and others. Judgment for defendants and plaintiff appeals. Reversed and remanded.

Messrs. Worden & Grant and *Messrs. Beackford & Huntoon,* for Appellants, submitted a brief and one in reply to that of Respondents; *Mr. E. G. Worden* argued the cause orally.

Messrs. Marshall & Dousman and *Mr. J. E. Wasson* submitted a brief; *Mr. Charles J. Dousman* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought in pursuance of section 2326 of the Revised Statutes of the United States (U. S. Comp. Stats., sec. 4623), to determine an adverse claim to the Royal Dixie

---

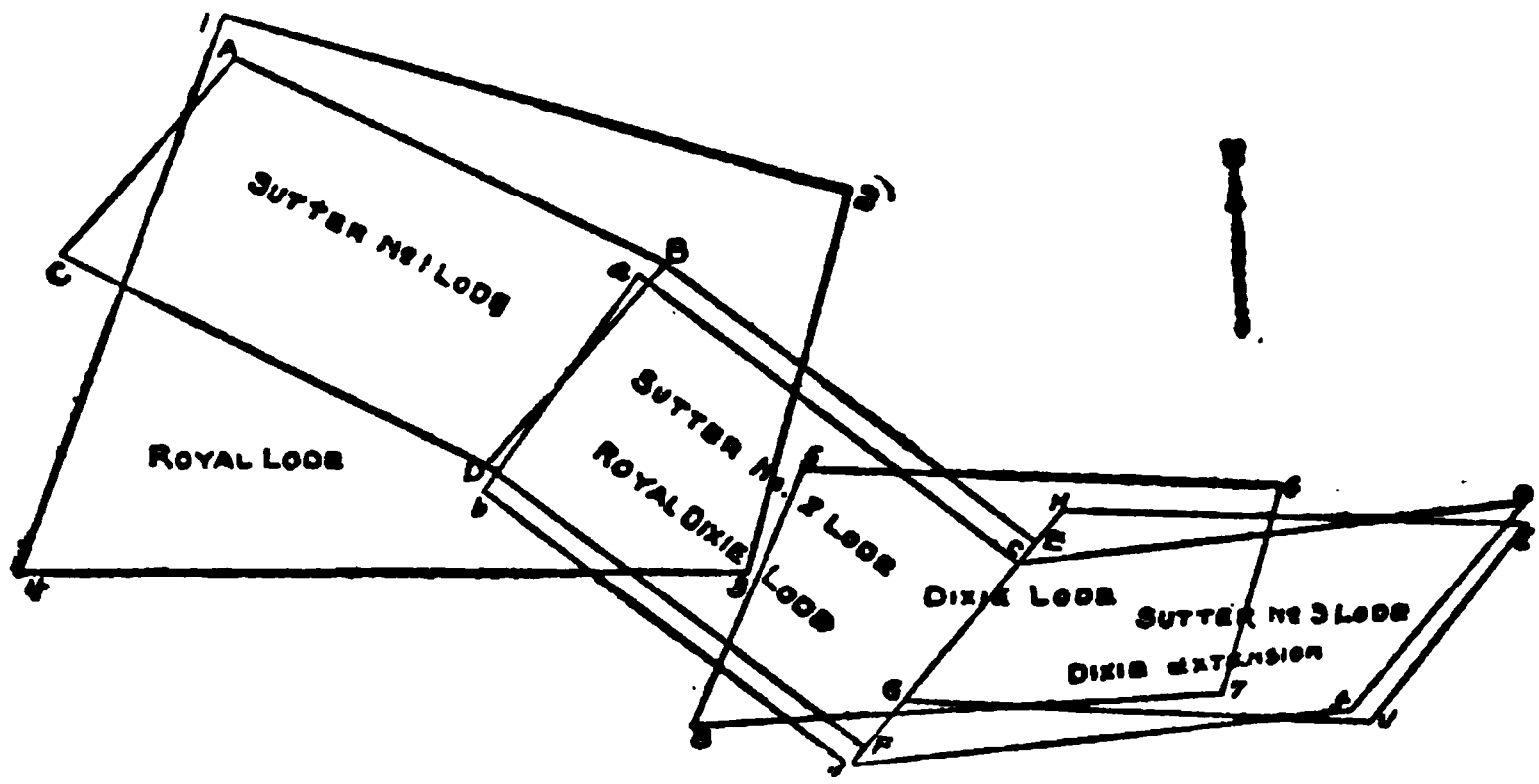
9. On respective rights of one who relocates mining ground before, and one who relocates it after, the abandonment or forfeiture of a senior location, see notes in 68 L. R. A. 842; 16 L. R. A. (n. s.) 162.

and Dixie Extension lode mining claims, situate in Fergus county, of which plaintiff alleges he is the owner. To his second amended complaint, the defendants Julian A. Sutter, Eduard Sutter and C. B. Noble demurred, on the ground that it did not state facts to constitute a cause of action, and that it was ambiguous, unintelligible and uncertain. One Claudia Wegner was made a party defendant, but she did not appear in the court below by demurrer or otherwise. The court by a general order sustained the demurrer, and, plaintiff declining to plead further, rendered judgment dismissing the action. Plaintiff has appealed.

The pleading is very voluminous. It alleges in detail the several steps taken by plaintiff in making location of his claims. It then sets forth the facts upon which defendants predicate their claim, and proceeds to allege the conditions existing at the time their locations were made, for the purpose of impeaching their validity, and thus to make it manifest that their claim of title is without foundation. The following statement will be sufficient to present the questions submitted for decision:

The Royal Dixie and the Dixie Extension locations were made by plaintiff on April 21 and May 8, 1917, respectively. Amendments of both of these were made on July 26, 1917. Defendants base their claim upon three conflicting locations, designated as Sutter No. 1, No. 2 and No. 3. No. 1 was located on May 15, and the others on March 15 and 22, 1916, respectively. The two Sutters and Noble were the locators. The claims of both plaintiff and defendants are relocations of ground which had theretofore been substantially covered by claims known as the Dixie and Royal, located by one Henry Nietert on June 5 and October 4, 1909, respectively. These had been represented for each year up to and including the year 1915. On July 14, 1916, Nietert conveyed an undivided nine-tenths interest in them to the defendants, the two Sutters and C. B. Noble. On September 12, 1916, he conveyed the

remaining interest to Claudia Wegner. The subjoined diagram illustrates the relative situation of the several claims and the extent of the conflict between those of plaintiff and defendants.



The Royal and Dixie are designated by the numerals 1, 2, 3, 4 and 5, 6, 7, 8; the Sutter claims by the capital letters A, B, C, D; B, E, F, D and G, H, I, J; and the Royal Dixie and Dixie Extension by the small letters a, b, c, d and c, d, e, f. The point of discovery on the Sutter No. 1 is some distance to the west of the line "B D." This claim is therefore not involved in this controversy, except to the extent of the small area included in the triangle which has its base at "a." The points at which the discoveries of the Sutter No. 2 and No. 3 were made are within the area covered by the Royal Dixie and the Dixie Extension, though they are not indicated on the diagram.

To show the invalidity of defendants' locations, the plaintiff alleges that, in making the locations of the Royal and the Dixie, Nietert fully complied with the laws of the United States and the state of Montana relating to discovery, marking the boundaries, doing the preliminary work, and the making and recording of the certificates of location; that he thus became entitled to the possession of the ground covered by them, and thereafter continued to be entitled to the possession by doing, or causing to be done, the annual assessment work

upon them for each year up to and including the year 1915, and until he made conveyance to the two Sutters, Noble and Claudia Wegner; that each of the Sutter claims was relocated on September 14, 1916, by the defendants other than Claudia Wegner, while the ground was held by Henry Nietert and his grantees, the defendants, under and by virtue of the location of the Dixie and Royal lode claims, and that for this reason the ground covered by these claims was not then unoccupied, unappropriated public land of the United States; that the certificates of location of the Sutter claims do not contain such a description, by reference to natural objects or permanent monuments, as will identify them; that on the Sutter No. 1 and Sutter No. 3 no location work was done by the running of cuts or the sinking of shafts, as required by the statutes of Montana, and that for these several reasons they are not now, and never have been, valid and subsisting claims, and being in conflict with plaintiff's claims, constitute a cloud upon his title. It is further alleged that Claudia Wegner claims an interest in the Royal and the Dixie claims, but that her interest therein was abandoned by reason of the failure by her and her codefendants to do any assessment work on them for the year 1916, and hence that her claim is wholly without right. It further appears inferentially that, at the time plaintiff located the Royal Dixie and the Dixie Extension, he knew of the existence of the Sutter locations.

The amended complaint is not a model pleading. It would [1] have been entirely sufficient if plaintiff had confined himself to appropriate allegations showing his right to the ground covered by his locations, and left it to the defendants to disclose the nature of their claim. It was not necessary for him to go further, and show that defendants' adverse claim is without foundation. (*Woody* v. *Hinds*, 30 Mont. 189, 76 Pac. 1.) Since, however, he has assumed to do this, and the demurrer admits the truth of his allegations in this behalf, the question submitted for decision is whether, assuming the plain-

tiff's allegations to be true, they so far impeach the validity of the Sutter locations, or any of them, as to put the defendants upon the defensive.

In view of the fact that plaintiff made his locations with [2] knowledge that the defendants were claiming the ground under the Sutter locations, the allegations touching defects in the recorded certificates of these claims become wholly immaterial. (Rev. Codes, sec. 2293.) They may be passed without further notice. The important question presented is whether the ground in controversy was vacant at the time the Sutter locations were made, or, if not, whether the conveyance of them by Nietert put the defendants—the Sutters and Noble—in position to make valid relocation of the Sutter claims. That the earlier location of them was invalid there [3] can be no question. The Royal and Dixie being themselves valid and subsisting locations, the ground was not public domain, and therefore not open to exploration and purchase under the federal statute. (U. S. Rev. Stats., sec. 2319 (6 Fed. Stats. Ann., 2d ed., p. 509; U. S. Comp. Stats., sec. 4614.)

Section 2322, Revised Statutes of the United States (6 Fed. Stats. Ann., 2d ed., p. 523; U. S. Comp. Stats., sec. 4618), guarantees the exclusive right of possession to the prior locator, and thus excludes the idea that anyone else may enter thereon for any purpose during the life of a prior location. (*Belk* v. *Meagher*, 104 U. S. 279, 26 L. Ed. 735 [see, also, Rose's U. S. Notes]; *Brown* v. *Gurney*, 201 U. S. 184, 50 L. Ed. 717, 26 Sup. Ct. Rep. 509; *Gwillim* v. *Donnellan*, 115 U. S. 45, 29 L. Ed. 348, 5 Sup. Ct. Rep. 1110; *Farrell* v. *Lockhart*, 210 U. S. 142, 16 L. R. A. (n. s.) 162, 52 L. Ed. 994, 28 Sup. Ct. Rep. 681; *Street* v. *Delta Mining Co.*, 42 Mont. 371, 112 Pac. 701.) The law on this subject is well stated in volume 18 R. C. L., at page 1136, as follows: "A valid location of a [4, 5] mining claim so long as it is in full force and effect, operates as a bar to a second location of the premises so

claimed. Hence it is a general rule that an attempted location of a mining claim, based upon a discovery within a then valid and subsisting claim, is absolutely void for the purpose of founding an adverse claim, and does not attach upon the subsequent failure of the first locator to do the required annual assessment work; and a location of a mining claim at a time when a senior locator is not in default under state or federal laws is subordinate to a relocation by a stranger made after the rights of the first locator lapsed because of such default." The rule thus stated is conclusive as to the invalidity of the Sutter claims when they were first located. Did the ground become subject to relocation by reason of the conveyance of the Royal and Dixie claims by Nietert to the defendant? This inquiry, we think, must be answered in the negative. Under the provisions of section 2289 of the Revised Codes, the locator [6] or claimant may, at any time, relocate his own claim for any purpose except to avoid the doing of annual labor thereon required by the federal statute (U. S. Rev. Stats., sec. 2324; 6 Fed. Stats. Ann., 2d ed., p. 533; U. S. Comp. Stats., sec. 4620), subject to the proviso, however, that the relocation must comply in all respects with sections 2283, 2284 and 2286 of the Revised Codes.

It will be noted that defendant Wegner was not one of the locators of the Sutter claims and that she did not join in [7] relocating them. The relocation of the Sutter claims, so far as the two Sutters and Noble were concerned, was an abandonment of the Royal and Dixie locations. This, however, did not affect the rights of Wegner under her conveyance from Nietert. Her interest remained unaffected by the abandonment by them of their interest. She became their cotenant by virtue of the conveyance by Nietert. They, therefore, could not pursue such a course of conduct as to destroy her interest. She retained it under the conveyance until such time as she chose to convey it to some other person, or until she had concluded to abandon it. As the Nietert interest was based upon

valid subsisting locations, in the absence of some act on her part tantamount to an abandonment, the Royal and Dixie claims were still valid and subsisting claims at the time the Sutter relocations were made. It continued so until the year 1916, for the complaint alleges that Nietert owned and possessed these claims and did the annual representation work thereon up to and including the year 1915. The work done [8] during the year 1915 was sufficient to preserve Nietert's right until the 31st of December, 1916. (*McKay* v. *McDougall*, 25 Mont. 258, 87 Am. St. Rep. 395, 64 Pac. 669.) Under the application of the rule above the relocations were void, and the two Sutters and Noble were in no better position by reason of them than when they made the first locations. The result is that they acquired no right by virtue of their relocations. By reason of the fact that neither they nor Wegner did or caused to be done the annual representation work for the year 1916, the Nietert claims became subject to forfeiture, and thus became subject to relocation by plaintiff or any other person who chose to relocate them. They were in condition to be forfeited, and were forfeited by the locations made by plaintiff.

Aside from these considerations, it is alleged that the [9] excavation work required by the statute on the Sutter No. 1 and Sutter No. 3 was not done when they were relocated. This is expressly required upon relocation by the owner of his own claim. (Rev. Codes, sec. 2289.) The failure to do this then or thereafter, and before plaintiff made his locations, rendered the attempted relocation of them nugatory. It is a question whether the plaintiff's allegation on this subject should not have been broad enough to negative the idea that this work was done prior to the making of his locations. We do not venture to decide this question here, because counsel have not referred to it in their briefs. We call attention to it for the reason that the statute declares that the period of time prescribed for the performance of any act shall not be deemed

mandatory when the act shall have been performed before the rights of third parties have intervened. We are of the opinion that the other facts alleged in the amended complaint are sufficient to require an answer by the defendants. We think, also, that it does not merit condemnation on any of the grounds alleged in the special demurrer.

The judgment is reversed and the cause is remanded to the district court, with directions to set aside the judgment and overrule the demurrer.

Reversed and remanded.

ASSOCIATE JUSTICES REYNOLDS, COOPER, HOLLOWAY and GALEN concur.

Rehearing denied June 20, 1921.

HASSAN, APPELLANT, *v.* NORTHERN PACIFIC RY. CO., RESPONDENT.

(No. 4,342.)

(Submitted April 14, 1921. Decided May 23, 1921.)

[198 Pac. 446.]

Personal Injuries — Railroads — Master and Servant — Negligence—Burden of Proof—Evidence—Insufficiency—Nonsuit.

Personal Injuries—Railroads—Master and Servant—Nonsuit—When Proper.

1. In an action by a railroad section-hand to recover for injuries caused by a tie falling upon him from a car which he, with others, was unloading, a nonsuit was properly granted, his evidence not disclosing negligence on the part of anyone to which the fall of the tie and the consequent injuries could be said to have been attributable. (MR. JUSTICE COOPER dissenting.)

Same—Negligence—Burden of Proof.

2. In a personal injury action by an employee against his employer, whether based upon the Employers' Liability Act (Chap. 29, Laws 1911) or not, plaintiff has the burden of proving negligence.

Appeals from District Court, Silver Bow County; Edwin M. Lamb, Judge.

[60 Mont. 105.]

ACTION by John Hassan against the Northern Pacific Railway Company. Nonsuit entered, and from the judgment and a denial of a new trial, plaintiff appeals. Affirmed.

Mr. J. O. Davies, for Appellant, submitted a brief and argued the cause orally.

Messrs. Walker & Walker and *Messrs. Gunn, Rasch & Hall,* for Respondent, submitted a brief; *Mr. E. M. Hall* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Plaintiff instituted this action to recover damages for personal injuries. The trial court granted a motion for nonsuit, and a judgment was entered dismissing the complaint. From that judgment and from an order denying a new trial, plaintiff appealed.

The complaint alleges that on November 9, 1915, plaintiff was employed by the defendant in its yards at Butte, loading and unloading material from cars; that defendant, through its foreman, John J. Kelly, had negligently permitted a car of railroad ties to be loosely and negligently loaded; that the foreman negligently ordered plaintiff to work close to the car, and while he was engaged in the work in obedience to the order, one of the ties, so loosely loaded through the negligence of defendant, fell from the car, striking plaintiff, and causing the injuries of which he complains.

The answer admits defendant's corporate existence, and that plaintiff was employed by it on November 9, 1915, and denies every other allegation of the complaint.

Upon the trial plaintiff testified in his own behalf that on [1] November 9, 1915, he was employed by the defendant as a section-man, and engaged in unloading coal at the depot; that the foreman, Kelly, ordered him to go about a block and

a half and assist in unloading a car of ties that had come in; that when he reached the car of ties the foreman ordered him to remove a tie from under the car, and while he was engaged in that work a tie from the top of the car fell upon him, causing injuries which are described somewhat at length. He testified further that the ties were on a flat car which "did not have any sides permanently built up on the car above the bottom"; that the posts on the sides of the car had been removed and the wires cut; that the purpose of the posts "was to keep the ties together from falling down"; that at the time he was injured some men were "getting up on the car, and some had gone up, and they were waiting for me to pull this tie from under, and then begin unloading"; that Kelly told him to hurry, and then walked away, and was six or seven feet away from the car when he gave the order.

On cross-examination plaintiff testified: "Before we went up there they had some men to cut off the wires and cut the posts, and then we went over to unload the ties. The posts were cut and the wires cut when I first came up there. At that time there were a couple of men on the other corner of the car of ties, on top. There was just that one tie on the ground when I first got up there. It was on the ground; one end of it was under the car, in front of a wheel. * * * It was just about when I had lifted, partly the tie from the ground, when I was in a position of pulling the tie away that the other tie struck me. The tie slipped from the car and struck me with one end. * * * The car was standing still all the time from the time I first went up there until this tie fell off. The men on the car were on the other corner of the car. They were on the same side where I was, on the other corner, the other end of the car. * * * When Mr. Kelly brought me up there from the coal-cars he simply told me to pick that tie up, and he then walked right on. * * * I don't know how far he had gotten away when I started to pull the tie."

[60 Mont. 105.]

George Raisis, a witness on behalf of plaintiff, testified that he was working with plaintiff at the time of the accident; that the foreman told plaintiff "to pull the ties off the car. When he pulled tie off car another tie came off from the top and hit John Hassan on the side. The tie which John Hassan was pulling was under the car; it was near the car; it was right by the rail. * * * The ties were piled about twelve or thirteen feet on the car. The car had stakes out. We had about 100 ties out of car when we took the stakes out. The assistant foreman took the stakes out. * * * At the time the tie fell on the plaintiff John Hassan, I was working in the end of the car about fifteen feet from the place where the tie fell." On cross-examination he testified: "I was standing on the ground at the time the tie fell. There were two or three men on top of the car at the time the tie fell off. They were unloading ties. * * * These were square ties, railroad ties; they were about seven or eight feet long. * * * I heard only the assistant foreman tell John Hassan to pull the tie off the car. * * * It was two or three minutes before John Hassan started to pull the tie out from under the car that Kelly had gone away. There were two or three men on the car unloading ties right along."

The foregoing fairly summarizes the evidence introduced by plaintiff, and upon which the motion for nonsuit was based.

The burden was imposed upon the plaintiff to prove [2] negligence, and in this he failed. It is therefore immaterial whether Chapter 29, Laws of 1911, applies to one in the capacity in which plaintiff was engaged at the time he was injured. That the evidence is insufficient to make a case for the jury is so obvious that a discussion of it or of the rules of law applicable would be a work of supererogation. With this in mind, the case cannot be distinguished from *McGowan* v. *Nelson,* 36 Mont. 67, 92 Pac. 40, and upon the authority of that case the judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS and GALEN concur.

MR. JUSTICE COOPER: I dissent. Appellant relies upon the negligent order given by the foreman. The complaint charges the defendant with the negligent loading of ties upon a car, and negligently directing the plaintiff to remove another tie from beneath it. The evidence shows that the plaintiff and other men were brought from another part of the yard to unload the ties from this car, a flat car. The posts and wires designed to hold them in place had already been removed by someone else. The plaintiff testified that "There were some men getting upon the car, and some had gone up, and they were waiting for me to pull the tie. Kelly came along with us; he gave me the order to pull the tie; told me to hurry along; that they had to unload the car; and he walked away from me. Kelly was about six or seven feet away when he gave the order to pull this tie out." About 100 ties had been thrown off at the time the order was given to plaintiff. Kelly was the foreman, directing the movements of the crew. The record does not show that any of the men were immediately above the plaintiff when the tie started to fall. Under these circumstances, it is proper to infer that the car was negligently loaded. In any event, it was the foreman's duty to observe immediate conditions, and not to negligently send plaintiff into a place of danger. If he had exercised due care, he might have noticed the precarious position of the tie before delivering the order. With plaintiff's eyes fixed upon the tie under the car, he could not be expected to apprehend conditions above him. He had a right to assume that Kelly would not expose him to danger from another agency out of his vision.

If we substitute the name of Kelly for that of Price, and ties for the lumber, the circumstances shown in *Hardesty* v. *Largey Lumber Co.*, 34 Mont. 151, 86 Pac. 29, furnish a complete

analogy to those presented here. This court, reviewing a ruling of the trial court in denying a nonsuit, used these words: "The evidence further shows that the plaintiff was directed by Price to go to the very place where he was injured, and it is self-evident that, if properly piled, the lumber would not have fallen of its own account." This is just as true of the tie in question. In my view, that case is favorable to plaintiff's contention.

The law, it seems to me, applicable to this case is exemplified by Mr. Labatt, in volume 4, section 1470, page 4304, of his latest edition on Master and Servant, where is is said: "According to the great majority of the cases, therefore, all that is necessary to fix liability upon the master is that the negligent order which caused the injury should be proved to be incident to the performance of the duties of his position." In section 1364, page 3939, the same author further explains the rule announced, thus: "The judicial theory is that the order, having a natural tendency to throw the servant off his guard, may properly be considered to excuse him from the exercise of the same degree of care as would have been incumbent on him if this case had not involved this factor." (See, also, 2 Bailey's Personal Injuries, sec. 414, pp. 1256, 1261; 8 Thompson on Negligence, sec. 3814.)

McGowan v. *Nelson*, 36 Mont. 67, 92 Pac. 40, did not involve the negligent order of a vice-principal. The following cases from other jurisdictions did: *Lee* v. *Woolsey*, 109 Pa. 124; *Johnson* v. *Minneapolis etc. Co.*, 67 Minn. 141, 69 N. W. 713; *Foster* v. *Railway Co.*, 115 Mo. 165, 21 S. W. 916; *Illinois Steel Co.* v. *Schymanowski*, 59 Ill. App. 32; *Haley* v. *Case*, 142 Mass. 323, 7 N. E. 877; *Sambos* v. *Cleveland etc. R. R.*, 134 Mo. App. 460, 114 S. W. 567; *Dooley* v. *Town of Sullivan*, 112 Ind. 451, 2 Am. St. Rep. 209, 14 N. E. 566; *Harrison* v. *Denver R. Co.*, 7 Utah, 523, 27 Pac. 728.

The foreman's duty brought him in full view of the entire operations, and, had he used ordinary care to observe the con-

ditions then presented, he might have delayed his order until the danger was past, or have given plaintiff timely warning of the falling tie. Prompt obedience to the orders of a superior, without time, opportunity or mind to apprehend danger, not immediately and obviously threatening, should not defeat the action.

The foreman's demeanor at the time might have suggested to Hassan that more was to be feared from debate upon the propriety of his order than from contact with a falling tie, or any other danger then apparent to him. The case is not entirely free from doubt, but, in my opinion, the evidence presents a case for the jury upon its weight, not one of legal sufficiency for the court.

STETTHEIMER ET AL., APPELLANTS, v. CITY OF BUTTE, RESPONDENT.

(No. 4,324.)

(Submitted April 12, 1921. Decided May 23, 1921.)

[198 Pac. 455.]

Quieting Title—Cities and Towns—Streets and Alleys—Prescription — Adverse Possession — Evidence — Sufficiency — Findings—New Trial Order—Discretion.

Quieting Title—Cities and Towns—Prescription—Adverse Possession—Findings—Evidence—Sufficiency.

1. In an action to quiet title to portions of a lode mining claim asserted by defendant city to have been in its possession and used by it adversely for street purposes for more than the statutory period, evidence *held* not to preponderate against the finding of the jury in favor of defendant.

New Trial Order—Discretion—Appeal and Error.

2. It is only for manifest abuse of discretion on the part of the trial court in granting or refusing a new trial that its action will be reversed on appeal.

Cities and Towns—Streets and Alleys—Prescription.

3. Under sections 6432 and 6435, Revised Codes, a prescriptive right can be built upon public use of land for street purposes, jurisdiction having been acquired by the city authorities and maintained for a period of ten years.

[60 Mont. 111.]

Appeal from District Court, Silver Bow County; Edwin M. Lamb, Judge.

ACTION by Joseph C. Stettheimer and others against the City of Butte. Verdict and judgment for the defendant. From an order denying motion for new trial, the plaintiffs appeal. Affirmed.

Mr. Frank Woody, Mr. B. K. Wheeler, and *Mr. A. A. Grorud,* for Appellants, submitted a brief; *Mr. Woody* argued the cause orally.

Continued user by the public for the statutory period of limitation is not sufficient to vest rights. As in all other cases of title acquired by prescription, the user must be adverse. A permissive user will never ripen into a right by prescription. The claim of right, as in all other cases of adverse possession, must be open and notorious, and here there was nothing of that kind. (*Hartley* v. *Vermillion* (Cal.), 70 Pac. 273; *Watson* v. *Board,* 38 Wash. 662, 80 Pac. 201; *Board* v. *Patrick,* 18 Wyo. 130, 107 Pac. 748.) There must be something more than mere travel over uninclosed lands by the public in order to establish a public highway over the same by prescription. (*O'Connell* v. *Chicago etc. R. Co.,* 184 Ill. 308, 56 N. E. 355; see, also, *Barnard Realty Co.* v. *City of Butte,* 48 Mont. 102, 136 Pac. 1064.)

The record in this case fails to show any of the elements of dedication by the city. The respondent relies upon prescription to sustain the title to the land in controversy.

Mr. R. L. Clinton, Mr. C. F. Juttner and *Mr. N. A. Rotering,* for Respondent, submitted a brief; *Mr. Clinton* argued the cause orally.

Since 1895, one of the essential elements is the assuming of jurisdiction of the ground by the public authorities. In this case the proof preponderates decidedly to the effect that the public used the ground as streets and that the public author-

ities assumed control over them. Hence the decree of the court is right. (*Pope* v. *Alexander*, 36 Mont. 82, 92 Pac. 203; *Lockey* v. *City of Bozeman*, 42 Mont. 387, 113 Pac. 286.) There is nothing in the case of *Barnard Realty Co.* v. *City of Butte*, 48 Mont. 102, 136 Pac. 1064, and 55 Mont. 384, 177 Pac. 402, which holds contrary to our contentions. In that case the evidence preponderated decidedly against the decree.

The answer did not contain any plea of dedication. But that evidence or proof of common-law dedication is admissible under a general denial is indicated by the decision of the court in the case of *Kaufman* v. *City of Butte*, 48 Mont. 400, 138 Pac. 770.

Selling lots according to the map or plat on which streets and alleys are delineated, whether recorded or not, operates as an irrevocable dedication of the streets to the municipal government and to public use. (*Kittle* v. *Pfeifer*, 22 Cal. 484; *Preston* v. *City of Navasota*, 34 Tex. 684; *Winona* v. *Huff*, 11 Minn. (Gil. 75) 119; *Carter* v. *City of Portland*, 4 Or. 339; *Lockland* v. *Smiley*, 26 Ohio St. 94; *Bridges* v. *Wyckoff*, 67 N. Y. 130; *Schneider* v. *Jacob*, 86 Ky. 101, 5 S. W. 350.) User proves acceptance. (*San Francisco* v. *Canavan*, 42 Cal. 541; *Carpenteria School District* v. *Heath*, 56 Cal. 478.)

A dedication of a street or highway may be inferred from a long and uninterrupted user by the public with the knowledge and consent of the owner. (*McKey* v. *Hyde Park Village*, 134 U. S. 84, 33 L. Ed. 860, 10 Sup. Ct. Rep. 512; *Pollard* v. *Hagan*, 44 U. S. 212, 11 L. Ed. 565 [see, also, Rose's U. S. Notes].)

MR. JUSTICE COOPER delivered the opinion of the court.

This action involves the right of the defendant to use and occupy portions of the Frankie lode. The premises in dispute are traversed by the southern extension of Main Street, and by Kaw Avenue from its junction with Main Street to its outlet into Front Street.

The plaintiffs allege that they are the owners of the Frankie lode claim, and that defendant, without right, by force of arms, and against their will, entered into the possession of portions thereof, began, and are still hauling and depositing dirt thereon, and withholding possession thereof from plaintiffs under a pretended claim of right thereto. The prayer is that the defendant be restrained from further interference with their possession; that their title be quieted and the cloud thus cast thereon removed. Defendant's answer is that for more than thirty years immediately prior to April 30, 1913, as against the plaintiffs and all others, it has been in the sole, notorious, exclusive and adverse use and possession thereof as public streets and thoroughfares of the city known as Kaw Avenue and Main Street; and for a period of more than ten years next preceding April 30, 1913, the people of the city of Butte and the public generally have used and enjoyed the portions in dispute as such. These averments are put in issue by plaintiffs' reply thereto. The case was tried by the court with the aid of a jury. Upon the evidence adduced, and under the court's instructions, the jury returned a general verdict in favor of the defendant, and judgment was entered thereon. Plaintiffs' motion for a new trial was denied, and this appeal is from that order.

In the brief and argument, appellants confine the issues for our consideration to the naked legal question of the sufficiency of the evidence to establish adverse user by the city for the period of ten years next preceding the thirtieth day of April, 1913. Despite the nature of the action, the case was submitted to the jury upon the evidence and the instructions of the court upon the law, upon which a general verdict for defendant was [1] returned. Assuming, without deciding, that plaintiffs' title to the ground occupied was complete, nevertheless, if the defendant adduced proof sufficient to take the case to the jury upon the question of its adverse occupancy and use for the period prescribed by the statute (Rev. Codes, secs. 6432, 6435),

the findings of the jury are not to be disturbed on appeal—unless the evidence preponderates against them—for the reason that: Since the enactment of section 6253 of the Revised Codes, on appeals in equity cases, this court has observed the rule: The findings of the trial court will not be set aside unless there is a decided preponderance in the evidence against them; and, when the evidence as it appears in the record, fully considered, furnishes reasonable grounds for different conclusions, the findings will not be disturbed." (*Gibson* v. *Morris State Bank,* 49 Mont. 60, 140 Pac. 76.) Primarily, the question at issue was one for solution by the [2] jury and the trial court.

"As we have so often said, the conclusion of the jury in such a case must be accepted as final and conclusive, subject to the rule, however, that it is within the sound legal discretion of the trial judge to grant a new trial on motion of the losing party, if, aided by his recollection of the appearance and conduct of the witnesses in giving their testimony at the trial, he is impelled to the conclusion that the evidence as a whole preponderates against the verdict. (*Orr* v. *Haskell,* 2 Mont. 225; *Western Min. Supply Co.* v. *Melzner,* 48 Mont. 174, 136 Pac. 44; *Gibson* v. *Morris State Bank* [*supra*].) Otherwise the motion should be denied. In no case will the conclusion of the trial judge in disposing of the motion be revised by this court, except for manifest abuse of discretion." (*Jones* v. *Shannon,* 55 Mont. 225, 175 Pac. 882.)

The action is of equitable cognizance. (*Barnard Realty Co.* v. *City of Butte,* 48 Mont. 102, 136 Pac. 1064; *Id.,* 55 Mont. 384, 177 Pac. 402.) Unless, therefore, the evidence does preponderate against the findings of the jury, it was no abuse of discretion to refuse plaintiffs a new trial. (*Robitaille* v. *Boulet,* 53 Mont. 66, 161 Pac. 163; *Pope* v. *Alexander,* 36 Mont. 82, 92 Pac. 203, 565.) The reason why this is so is made apparent from the language of Chief Justice Brantly, expressing the opinion of this court on rehearing, in the case

last cited, *viz.*: "Though the evidence is presented in question and answer, it is in cold type, without the gestures, behavior or appearance of the witnesses, and often, as in this case, the illustrations made by them through the medium of maps, diagrams and other instrumentalities used to make their statements intelligible. It would be manifestly out of place for this court to undertake to try a case and determine it as does the district court."

Upon the trial below, seven witnesses testified that Kaw Avenue and the portion of Main Street in dispute had been continuously traveled as streets and highways for a period ranging from seventeen to twenty years prior to the trial. Other persons were present to testify to the same thing. They were not put upon the stand because of a rule of the court which limited the witnesses upon the one point to that number. At least three of the seven witnesses produced by the defendant had been employed at its expense in directing or doing the work of grading, leveling, surfacing and filling in the strips of ground within the confines of Kaw Avenue and the portion of Main Street in dispute at various times during that period. In this condition of the evidence, the presumption that the property in dispute had been occupied and used by the city openly and notoriously adverse to plaintiff's legal title for more than ten years before the commencement of the action has not been overcome. The finding of the jury to that effect places it beyond revision by this court. Under sections 6432 and 6435 [3] a prescriptive right can be built upon public use of land for streets and thoroughfares, when jurisdiction has been acquired by the city authorities and maintained for a period of ten years, as the proof here shows it was. These sections of the Codes, in conjunction with section 3259, were so construed in *Barnard Realty Co.* v. *City of Butte*, 48 Mont., at p. 111, 136 Pac. 1068, as this language exemplifies: "That the streets of these municipalities are subject to the control of the municipal authorities is true. (Sec. 3259, Rev. Codes.) That

the provision in question does not in terms refer to them is also true. But, taking sections 1337 and 1340 together, a legislative intention is clearly evinced to provide a general rule by which highways of every character may be established or vacated. The latter section has reference to those highways enumerated in the former, to streets, *etc.*, as well as to county roads; and though the only public authority mentioned is the board of county commissioners, it cannot be conceived that the legislature by this reference alone intended that this board should thereafter have control of the streets of cities and towns, or that these should be established by methods other than those prescribed for the establishment of county roads." Upon that point—the only one seriously controverted by plaintiffs—the jury found, not only that the public had enjoyed continuous and uninterrupted use of the premises in dispute, but that by building up and maintaining them as streets of the city the defendant had assumed and maintained proprietorship and jurisdiction over them for the full period named in the statute. This fully satisfied the requirements of sections 1337 and 1340 of the Revised Codes.

An examination of the authorities upon which appellants rely for a reversal of the ruling of the trial court discloses the fact that they are all based upon statutes different in language and in terms from our own, and are not authority upon this appeal.

The order appealed from is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, HOLLOWAY and GALEN concur.

HAWLEY, RESPONDENT, *v.* RICHARDSON, APPELLANT.

(No. 4,336.)

(Submitted April 13, 1921. Decided May 23, 1921.)

[198 Pac. 450.]

Malicious Prosecution—Complaint—Sufficiency—Primary and Secondary Evidence—Order of Proof—Instructions—Law of Case—Elements of Damages—What too Remote.

Malicious Prosecution—Complaint—Sufficiency.

1. Complaint in an action for malicious prosecution examined and *held* sufficient to state a cause of action.

Pleading and Practice—Admissions Need not be Proved.

2. Facts admitted by the answer need not be proved.

Malicious Prosecution—Warrant of Arrest—Best Evidence—Parol Evidence—Harmless Error.

3. In the absence of proof of the loss or destruction of the warrant on which plaintiff, in an action for malicious prosecution, was arrested and brought into court, parol evidence of its contents or of the contents of the indorsement thereon was erroneously admitted; error, however, *held* to have been cured by subsequent proof of loss of the warrant.

Trial—Order of Proof—Discretion.

4. The order of proof is a matter largely confided to the discretion of the trial court.

Malicious Prosecution—Evidence of Plaintiff's Discharge—When Parol Evidence Admissible.

5. The best evidence of plaintiff's discharge after preliminary examination on a charge of grand larceny was the indorsement on the warrant on which he was arrested, and not the entries on the magistrate's docket; but, upon proof of the loss of the warrant, parol evidence was admissible to prove the fact of his discharge.

Same—Proof of Filing Complaint—Presumptions.

6. Plaintiff in an action for malicious prosecution was not required to prove that the complaint against him was actually filed, where defendant admitted that he subscribed and swore to it, in view of the presumption (sec. 7962, subd. 15, Rev. Codes) arising, upon proof that a warrant was issued and proceedings had under it, that official duty was regularly performed and that the complaint was duly filed.

Same—Parol Evidence of Entries in Justice's Docket, When Admissible.

7. Where the entries in a justice's docket in the matter of plaintiff's arraignment on a charge of grand larceny were incomplete and unintelligible, parol testimony was admissible to show that a preliminary examination was had.

[60 Mont. 118.]

Same—Probable Cause—Nonprofessional Advice not Admissible in Evidence.

8. In an action for malicious prosecution, evidence that defendant in instituting the prosecution acted upon the advice of nonprofessional persons is inadmissible to show probable cause.

Same—Probable Cause—Proper Instruction.

9. An instruction that to constitute probable cause justifying the institution of a criminal prosecution, it is only necessary that there should be evidence which reasonably warrants a belief in the guilt of the accused and that it need not be sufficient to insure a conviction, properly stated the law.

Same—Malice—Want of Probable Cause—Proper Refusal of Instruction.

10. Refusal of a requested instruction that the discharge of plaintiff, in an action for malicious prosecution, by a justice of the peace after a preliminary examination, was not any evidence whatsoever of malice on the part of defendant or of want of probable cause, from which malice may be implied, was proper.

Trial—Instructions—Repetition.

11. Refusal of a requested instruction fully covered by instructions given is not error.

Malicious Prosecution—Probable Cause—Improper Instruction.

12. An instruction requested by defendant that, in determining whether there was probable cause for instituting the criminal proceedings, the jury might make some allowance for the fact that defendant felt himself injured by the offense which he alleged plaintiff had committed, and under the circumstances could not be held as likely to draw his conclusions with the impartiality of a disinterested person, *held* improper as, in effect, commenting on the evidence.

Same.

13. An instruction that probable cause is a reasonable ground, or a suspicion supported by circumstances sufficiently strong in themselves to warrant an ordinarily prudent and cautious man acting impartially and honestly in believing a crime has probably been committed, was improper, as requiring the party making a criminal complaint to act with entire impartiality, and as not taking into account the circumstances surrounding him at the time.

Same—Instruction not Objected to—Law of Case.

14. An erroneous instruction, given without objection, became the law of the case, the supreme court on appeal being precluded by section 9271, Revised Codes, from reversing a judgment for error in instructions not specifically pointed out and excepted to at the settlement of the instructions.

Same—Conflict in Instructions—Proper Refusal.

15. Where defendant did not object to an erroneous instruction which thereupon became the law of the case, refusal to give an instruction which might properly have been given, but, if given, would have been essentially conflicting with the first, he was in no position to complain.

---

8. Magistrate's or layman's advice as defense to action for malicious prosecution, see notes in 16 **Ann. Cas.** 718; **Ann. Cas.** 1918A, 498; 12 **A. L. R.** 1230.

10. Discharge by magistrate as evidence of want of probable cause for criminal prosecution, see notes in 3 **Ann. Cas.** 112; 7 **Ann. Cas.** 859.

[60 Mont. 118.]

Same—Commission of Crime—Improper Instruction.

16. An instruction offered by defendant stating, among other things, that "the policy of the law is to favor prosecutions for crime" was properly refused, as calculated to lead the jury to infer that, in the opinion of the court, plaintiff was guilty of the crime with which he had been charged by defendant.

Same—Definition of Crime Charged Against Plaintiff—Proper Instruction.

17. An instruction defining grand larceny in the language of the statute was properly given, as furnishing a standard by which the jury might determine whether the facts and circumstances were such as to warrant defendant in an action for malicious prosecution, in believing that plaintiff was guilty of that crime.

Same—Evidence—Sufficiency.

18. Evidence examined and *held* sufficient to take the case (an action for malicious prosecution) to the jury and to justify the court's refusal of a new trial.

Same—Improper Element of Damage—Instructions.

19. Money paid by plaintiff to an attorney in opposition to extradition proceedings which, after a preliminary hearing, he abandoned and returned to Montana voluntarily, was too remote an element of damages, and an instruction that the jury might take this item of expense into consideration in arriving at their verdict was error.

Appeals from District Court, Richland County; C. C. Hurley, Judge.

ACTION by G. B. Hawley against H. N. Richardson. From a judgment for plaintiff, and from an order denying his motion for new trial, defendant appeals. Order denying new trial affirmed and cause remanded, with instructions to modify the judgment, and, as modified, judgment affirmed.

Mr. John A. Bird, Mr. H. J. Haskell, Mr. Park Smith and *Mr. Henry C. Smith,* for Appellant, submitted a brief; *Mr. Henry C. Smith* argued the cause orally.

The court would not allow the county attorney to testify as to whether attorney Brattin had authority to draw the complaint and was acting as deputy county attorney after the complaint had been admitted. This was an important restriction of Richardson's rights; for the fact that a prosecutor acted in good faith, upon the advice of the county attorney, after a full statement of the facts, is always a defense to this action. In support of which statement we submit the following authorities: 26 Cyc. 31; *Widmeyer* v. *Felton,* 95 Fed. 926; *Sandell* v.

Sherman, 107 Cal. 391, 40 Pac. 493; *Struby* v. *Kyes*, 9 Colo. App. 190, 48 Pac. 663; *Martin* v. *Corscadden*, 34 Mont. 308, 86 Pac. 33. And counsel for the state, such as the county attorney, are the proper and usual persons to go to for advice. (26 Cyc. 33.) When it is shown that the prosecutor acted on the advice of the acting county attorney, the action cannot be sustained. (*Russel* v. *Deer*, 7 Ill. App. 181.)

The defendant attempted to show that he had recited the facts to his wife and the cashier of his bank and sought their advice. The testimony intended to be brought out was for the purpose of showing that Richardson acted as a reasonably prudent man would do under the facts and circumstances. He realized that he was an interested party and he sought the judgment of disinterested persons. It was sought to show that their advice accorded with his later acts. It is only necessary that the prosecutor act as a reasonably prudent man. (26 Cyc. 28.) "Representations of others that plaintiff was guilty of the offense charged, together with plaintiff's conduct in secreting himself, justified the prosecution." (*Mosley* v. *Yearwood*, 48 La. Ann. 334, 19 South. 274.)

It was reversible error to refuse defendant's instruction No. 3, wherein the court was requested to instruct the jury that the discharge of Hawley, by the justice of the peace, was not any evidence of malice or want of probable cause from which malice could be implied. This question was decided in the case of *Yocum* v. *Polly*, 1 B. Mon. (Ky.) 358, 36 Am. Dec. 583. (See, also, *Purcell* v. *Macnamara*, 9 East, 361, 103 Eng. Reprint, 610, and *Goldstein* v. *Foulkes*, 19 R. I. 291, 36 Atl. 9.)

There are numerous authorities to justify defendant's instruction No. 12, to-wit: "The public interest and the proper administration of justice in criminal matters require that such actions * * * for malicious prosecution and false imprisonment should not be maintained without clear proof of malice and the absence of probable cause." (*Maloney* v. *Doane*, 15 La. 278, 35 Am. Dec. 204; *Russell* v. *Chamberlain*, 12 Idaho, 299,

9 Ann. Cas. 1173, 85 Pac. 926; *Dwain* v. *Descalso*, 66 Cal. 415, 5 Pac. 903.) "Actions of this character are not favored by the courts." (*Henderson* v. *Francis*, 75 Ga. 178; *Taylor* v. *Baltimore etc. Ry. Co.*, 18 Ind. App. 692, 48 N. E. 1044; *Paddock* v. *Watts*, 116 Ind. 146, 9 Am. St. Rep. 832, 18 N. E. 518; *Seegar* v. *Pfeifer*, 35 Ind. 13; *Adams* v. *Lisher*, 3 Blackf. (Ind.) 241, 25 Am. Dec. 102; *Ross* v. *Kerr*, 30 Idaho, 492, 167 Pac. 654.) "To treat the individual upon whose oath the warrant issued for the arrest of another as a criminal, as warranting the success of the prosecution, at the risk of his fortune, would have a direct tendency to discourage the prosecution of offenders against the laws, and to insure the immunity of crime." (*Laville* v. *Biguenaud*, 15 La. Ann. 605; *Girot* v. *Graham*, 41 La. Ann. 511, 6 South. 815.)

It was reversible error for the court to give Instruction 4–A. It gave the jury the statutory definition of larceny; it could only have confused them at best. But aside from that, it was not necessary that Hawley should actually have been guilty of larceny. It was only necessary that there should have been reasonable warrant for believing in his guilt. (*Widmeyer* v. *Felton*, 95 Fed. 926; *Richey* v. *McBean*, 17 Ill. 63; *Foshay* v. *Ferguson*, 2 Denio (N. Y.), 617, 619; *Grant* v. *Deuil*, 38 Am. Dec. 228; *Smith* v. *McDonald*, 3 Esp. 7; *Long* v. *Rogers*, 19 Ala. 321; 2 Starkie on Evidence, 916.)

Mr. L. P. Leiper, for Respondent, submitted a brief; *Mr. Sydney Sanner*, of Counsel, argued the cause orally.

"A prosecution brought to aid in the collection of a debt or to obtain possession of property, and not to vindicate justice, is malice." (*Johnson* v. *Ebberts*, 11 Fed. 129, 6 Sawy. 538; *Wills* v. *Noyes*, 12 Pick. 324; *Ross* v. *Langworthy*, 13 Neb. 492, 14 N. W. 515; *Krug* v. *Ward*, 77 Ill. 603; *Kelley* v. *Sage*, 12 Kan. 109; *Shannon* v. *Jones*, 76 Tex. 141, 13 S. W. 477; *Alexander* v. *Harrison*, 38 Mo. 258, 90 Am. Dec. 431; 26 Cyc. 47.) Want of probable cause cannot be inferred from malice, but

malice may be implied or inferred as a fact from want of probable cause. (*Heap* v. *Parish*, 104 Ind. 36, 3 N. E. 549; *Merrion* v. *Mitchell*, 13 Me. 439, 29 Am. Dec. 514; 26 Cyc. 22; *Murphy* v. *Hobbs*, 7 Colo. 541, 49 Am. Rep. 366, 5 Pac. 119; *Ross* v. *Innis*, 35 Ill. 487, 85 Am. Dec. 373; *Turner* v. *Walker*, 3 Gill & J. (Md.) 377, 22 Am. Dec. 329; *Davis* v. *McMillan*, 142 Mich. 391, 13 Am. St. Rep. 585, 7 Ann. Cas. 854, 3 L. R. A. (n. s.) 928, 105 N. W. 862; *Eickoff* v. *Fidelity etc. Co.*, 74 Minn. 139, 76 N. W. 1030.)

The respondent had the same right to counsel at that hearing before the governor of Minnesota as he had at the preliminary hearing held before Justice Smith. It follows that the counsel fees paid to the Minneapolis attorneys having been shown to be reasonable, was a proper element of damage. (18 R. C. L., sec. 54.)

When the evidence bearing upon the question of probable cause is conflicting, it is the province of the jury to determine which of the witnesses speaks the truth. (*Grorud* v. *Lossl*, 48 Mont. 274, 136 Pac. 1064; *Ross* v. *Hixon*, 46 Kan. 550, 26 Am. St. Rep. 141, 12 L. R. A. 760, 26 Pac. 955; *Casebeer* v. *Rice*, 18 Neb. 203, 24 N. W. 693; *Simmons* v. *Gardner*, 46 Wash. 282, L. R. A. 1915D, 16, 89 Pac. 887; *Wuest* v. *American Tobacco Co.*, 10 S. D. 394, 73 N. W. 903; *Heap* v. *Parish*, 104 Ind. 36, 3 N. E. 549; *Matson* v. *Michel*, 81 Kan. 360, L. R. A. 1915D, 1, 105 Pac. 537; *Stoecker* v. *Nathanson* (Neb.), 70 L. R. A. 667.)

Under the charge made, the plaintiff could have maintained an action for libel. The charge made was libelous *per se*. The action for malicious prosecution is a bar to an action for libel or slander by reason of the making of this charge. (Cooley on Torts, 193; 3 Sutherland on Damages, 699; *Sheldon* v. *Carpenter*, 4 N. Y. 579, 55 Am. Dec. 303.)

"In malicious prosecution for larceny the court may instruct the jury that plaintiff, if entitled to recover at all, can recover such actual damage as naturally and proximately follow the

arrest, as physical suffering and wounded pride." (*Lunsford* v. *Dietrich*, 86 Ala. 250, 11 Am. St. Rep. 37, 5 South. 461; 8 R. C. L., secs. 84, 103; 8 Ency. of Evidence, 427.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought to recover damages for malicious prosecution. Plaintiff prevailed in the lower court, and defendant appealed from the judgment, and from an order denying his motion for a new trial.

It is alleged in the complaint that on the twenty-eighth day [1] of May, 1915, defendant herein appeared before John H. Smith, a justice of the peace at Sidney, Montana, and maliciously and without probable cause made, subscribed and verified a complaint charging this plaintiff with grand larceny in stealing a certain Buick automobile; that a warrant was duly issued upon the complaint; that plaintiff was arrested in Minneapolis, and returned to Sidney; that he was arraigned before the justice of the peace, and given a preliminary examination; that, upon such hearing, evidence was introduced; that defendant appeared as a witness, and testified against the plaintiff; and that, at the conclusion of the hearing, plaintiff was discharged, and the criminal proceeding finally terminated. Then follow appropriate allegations of plaintiff's damages, with a prayer for judgment. To this complaint defendant interposed a demurrer, which was overruled, and then answered, denying that he acted maliciously or without probable cause, and that plaintiff was damaged in any amount whatever. As

ve defense he alleged that on May 26 he signed and
omplaint before John H. Smith, the justice of the
ing plaintiff with grand larceny; that he first made
omplete presentation of the facts to an attorney at
.e was advised that probable cause existed for be-
ıtiff guilty, and that he acted in good faith upon
of counsel; that thereafter, on May 28, the first

complaint was dismissed upon motion of the county attorney, and he then signed and verified the complaint involved in this action at the request and upon the direction of the county attorney after a full and fair statement of the facts had been made. All of the affirmative allegations were denied by the reply.

The complaint sets forth all the facts necessary to state a cause of action (*Stephens* v. *Conley*, 48 Mont. 352, Ann. Cas. 1915D, 958, 138 Pac. 189), and is not open to the criticism that causes of action are improperly united.

Complaint is made of the rulings of the trial court in admitting evidence of the proceedings had before the justice of **[2]** the peace. It was not necessary for plaintiff to prove the institution of the criminal proceeding, or that defendant was the responsible agency for it. These two facts are admitted sufficiently by the answer. The docket entries made by the justice of the peace were introduced in evidence, but they are so meager and were kept after such fashion that they do not prove anything whatever. Without further preliminary proof, and **[3]** over objection, plaintiff then offered oral testimony that a warrant was issued and served; that plaintiff was arrested and brought into court; that he was given a preliminary examination at which witnesses, including defendant herein, were examined, and that plaintiff was discharged. The warrant itself was the best evidence that it was issued and the sheriff's return the best evidence of the action taken under it. In the absence of proof of the loss or destruction of the warrant, parol evidence of its contents, or of the contents of the indorsement on it, was inadmissible and the court erred in its rulings, but later, during the trial, the necessary proof was made of the loss of the warrant, and this, in our judgment, robs the errors of their harmful effect. The question resolves itself largely into **[4]** one of order of proof with respect to which the trial court must be permitted to exercise a reasonable discretion. (*Stephens* v. *Elliott*, 36 Mont. 92, 92 Pac. 45.) We fail to see

wherein defendant could have been prejudiced. If proof of the loss of the warrant had been introduced first, the competency of the oral testimony would be beyond question. (Sec. 7872, Rev. Codes; 3 Jones on Evidence, sec. 620.)

Counsel for appellant insist that the fact that plaintiff was [5] discharged could be proved only by the entries in the justice's docket, but in this they are in error. Section 9089 of the Revised Codes provides that the fact of discharge shall be evidenced by indorsement on the testimony or warrant. As the charge against plaintiff was not such as that the testimony was required to be reduced to writing, and filed as depositions, under the provisions of section 9087, the indorsement on the warrant would have furnished the best evidence of plaintiff's discharge, and, since the warrant was lost, parol evidence was admissible to prove the fact under the rule above.

The complaint, signed and verified by defendant, charging [6] plaintiff with grand larceny, was admitted in evidence. It bore a file-mark, but there was no evidence that the indorsement was made by Smith, the justice of the peace. We think it was not incumbent upon plaintiff to prove that the complaint was actually filed. Defendant admitted that he subscribed and swore to the complaint. By these acts he set the machinery of the law in motion. It was the duty of the justice to file the complaint, but over his action plaintiff had no control. Upon proof that a warrant was issued and the subsequent proceedings had, the presumption arises that official duty was regularly performed and that the complaint was duly filed. (Sec. 7962, subd. 15, Rev. Codes.)

If we assume that the justice of the peace is required to keep [7] a docket in criminal cases, the plaintiff cannot be held responsible for his failure to make the entries sufficiently complete to be intelligible, and under the circumstances the oral testimony that a preliminary examination was had was properly admitted. (1 Greenleaf on Evidence, sec. 513; 3 Jones on Evidence, sec. 623.)

[60 Mont. 118.]

Upon the trial defendant sought to show that, in addition to [8] his consultation with an attorney at law, he also consulted with and secured the advice of his wife and the cashier of his bank, and complaint is made of the rulings excluding this evidence. It is the general rule that the advice of nonprofessional persons is inadmissible to show probable cause. (26 Cyc. 33; 18 R. C. L. 50.)

Complaint is made of instruction No. 4 given to the jury, as [9] follows: "To constitute probable cause which would justify the institution of a criminal prosecution, it is only necessary that there should be evidence which reasonably warrants a belief in the guilt of the accused; it need not be sufficient to insure a conviction."

In *Martin* v. *Corscadden*, 34 Mont. 308, 86 Pac. 33, this court approved the following definition of "probable cause": "Probable cause is only such a state of facts and circumstances as would lead a careful and conscientious man to believe that the plaintiff was guilty." And in the further consideration of that definition, we said: "In the particular case, then, the inquiry must be, not whether the plaintiff was actually guilty, but whether the facts and circumstances were such as to warrant the defendant, as a prudent and conscientious man to believe him guilty. * * * All that is required is that a prudent and conscientious inquiry be made, and if it then appears that testimony is at hand or obtainable justifying a well-founded belief that a violation of the law can be established and a conviction secured, there is probable cause to proceed with the prosecution." Instruction No. 4 fairly states the rule as announced in the case above.

Exception is taken to the refusal of the trial court to give [10] defendant's requested instruction No. 3, as follows: "The discharge of Hawley by the justice of the peace is not any evidence whatsoever of malice on the part of Richardson or want of probable cause, from which malice may be implied." The court did not err. The same question was presented and

ruled adversely to appellant in *Grorud* v. *Lossl*, 48 Mont. 274, 136 Pac. 1069.

Instructions 1, 2 and 6, requested by defendant, are covered [11] fully by instruction 3 given by the court.

The court refused to give defendant's requested instructions 8 and 9, as follows: "8. You are instructed that in [12] determining whether there was probable cause for instituting the criminal proceedings by Richardson, you may make some allowance for the fact, if you believe it to be a fact, that Richardson felt himself injured by the offense which he alleged Hawley had committed, and under such circumstances he cannot be held as likely to draw his conclusions with the same impartiality that a person entirely disinterested would deliberately do." "9. All that was required of Richardson was that he should act as a reasonable and prudent man would be likely to act under like circumstances." However, the court gave the following definition of probable cause, in instruction No. 3: "Probable cause, as used herein, is a reasonable ground [13] or a suspicion, supported by circumstances sufficiently strong in themselves to warrant an ordinarily prudent and cautious man, acting impartially and honestly, in believing that a crime had probably been committed." We do not approve this definition. It requires the party making a criminal [14] complaint to act with entire impartiality, and does not take into account the circumstances surrounding him at the time he makes the complaint; but the instruction was given without objection. It became the law of the case, and we are precluded from interfering. Section 9271 of the Revised Codes provides, among other things: "No cause shall be reversed by the supreme court for any error in instructions which was not specifically pointed out and excepted to at the settlement of the instructions herein specified, and such error and exception incorporated in and settled in the bill of exceptions as herein provided." (See *State* v. *Cook*, 42 Mont. 329, 112 Pac. 537; *State* [illegible]*s*, 46 Mont. 468, 128 Pac. 588.)

Neither do we approve instruction 8 above, when considered standing alone. It amounts in effect to a comment upon the evidence. Our attention is directed to the case of *Spear* v. [15] *Hiles,* 67 Wis. 361, 30 N. W. 511, wherein an instruction embodying the general provisions of defendant's requested instructions 8 and 9 above was approved, but the court laid emphasis only upon the last sentence, which is defendant's offered instruction 9, and did not comment upon the other portion. If we assume that instruction 9 should have been given, if instruction 3 had correctly defined probable cause, still the court could not give that definition and also give instruction 9. The two are essentially conflicting, and since defendant did not object to instruction 3, he cannot complain that the court refused his offered instruction 9.

Instruction 12 tendered by the defendant, but refused by the court, correctly states an abstract proposition of law, but [16] it has no particular application to the facts of this case; on the contrary, the statement, "The policy of the law is to favor prosecutions for crime," might naturally lead the jury to infer that, in the opinion of the court, plaintiff was actually guilty of the larceny with which he had been charged by the defendant.

Complaint is made of instruction 4–A given to the jury, in which the court defined grand larceny in the language of the [17] statute. One of the principal questions for the jury's determination was: Were the facts and circumstances such as to warrant the defendant, as a reasonably prudent person, in believing that plaintiff was guilty of grand larceny? The definition would furnish a standard by which the jury might determine that question, and for this purpose we think it was given properly. The plaintiff's story of the automobile [18] transaction is substantially as follows: He had been engaged in purchasing and selling cattle, and had associated with one Balcolm. Balcolm had issued checks against plaintiff's bank account in Fairview, and plaintiff, fearful that the holders

of these checks would sue him and attach his property—the automobile in question, and a cow—on October 7, 1914, gave to defendant a bill of sale of the automobile and cow, for the sole purpose of covering up the property and, as he presumed, putting it beyond the reach of attachment process. He testified that he did not owe defendant anything; that he did not receive any consideration for the alleged transfer and that defendant had no interest in or lien upon the property; that the cow was afterward sold and the purchase price paid to plaintiff; that when he came to Fairview, on April 25, 1915, he told defendant that he was then going to take the automobile to Minneapolis, and did so. Defendant claimed, in effect, that the bill of sale was given him as security for the payment of $148.25, which he alleges plaintiff owed him, and had not paid. If plaintiff's story is true, defendant did not have probable cause, or any cause whatever, for instituting the criminal action, and the verdict can be accounted for only upon the theory that the jury accepted plaintiff's version as the true one, and did not believe defendant's testimony. The language of this court in *Grorud* v. *Lossl*, above, is pertinent here: "Of course, if the jury had accepted the story told by the defendant, the inevitable conclusion would have been that the plaintiff was guilty of the charge of larceny made against him, or, in any event, that the prosecution had not been instituted without probable cause. On the other hand, having accepted the story told by the plaintiff, with the legitimate inferences to be drawn from it, the jury were justified in concluding that the charge made was wholly without probable cause; and, having so concluded, they were at liberty to infer that in preferring the charge the defendant was prompted by malicious motives. * * * All the authorities agree that, while the plaintiff must prove both the want of probable cause and malice in order to make a *prima facie* case, they also agree that, when the absence of the former has been established, the presence of the latter may be inferred."

The evidence is sufficient to take the case to the jury, and to justify the court in denying a new trial.

Over objection of defendant, plaintiff was permitted to [19] show that he paid $75 to his attorneys in Minneapolis to appear before the governor of Minnesota and resist extradition, and the court instructed the jury that, if they found in favor of plaintiff, they might take this item into consideration as an element of damage. The evidence discloses, however, that, after some preliminary hearing before the governor, plaintiff abandoned his opposition, and came voluntarily with the Montana sheriff. Under these circumstances we think the money paid to the Minneapolis attorneys did not constitute a proper element of damages. It was altogether too remote.

Other assignments of error are made, but, in our judgment, they do not warrant special consideration.

The order denying a new trial is affirmed. The cause is remanded to the district court, with instructions to deduct $75 from the amount of the judgment as of the date of the entry judgment, and as thus modified, it will stand affirmed. Each party shall pay his own costs of these appeals.

Modified and affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, COOPER and GALEN concur.

UNITED STATES GYPSUM CO., APPELLANT, *v.* MACKEY WALL PLASTER CO. ET AL., RESPONDENTS.

(No. 4,665.)

(Submitted March 14, 1921. Decided May 23, 1921.)

[199 Pac. 249.]

Equity—Corporations—Capital Stock—Pledges—Sale—Denial of Opportunity to Offset Claim—Redemption—Receivers—Taxation of Costs.

Appeal—Receivers—Taxation of Costs—Error—Review.

1. Error incident to the taxation of costs in a receivership is reviewable on appeal from the judgment.

Corporations—Corporate Funds—Payment of Personal Obligations from—When not Illegal.

2. Where the entire capital stock of a corporation was owned by two persons, the corporation functioning only for their benefit, they could properly use corporate funds to pay their personal obligations.

Same—Capital Stock—Pledges—Sale Without Opportunity in Pledgor to Offset Claim—Redemption—When Proper—Equity.

3. Defendant company had leased its property to plaintiff with privilege of purchasing it for $50,000, $15,000 of which was due at the time a note for $8,000 made by two individual defendants owning all its capital stock to plaintiff fell due, which note had been secured by a pledge of capital stock of defendant company of the value of $19,000, the pledge agreement providing that upon failure to pay the note at maturity, the pledgee could sell the stock upon five days' notice and without advertising it for sale. Before due date of the note, the two individual defendants authorized plaintiff to deduct the amount due on the note from the $15,000 due defendant company. This plaintiff refused to do and sold the stock to itself for $99. *Held*, in an action by plaintiff to have itself judicially determined a stockholder in defendant company, that in view of the unfair and unconscionable conduct of plaintiff by which the two individual defendants were deprived of an opportunity to offset their claim against that due it from plaintiff, the district court, sitting in equity, properly decreed that the sale of the stock should be set aside and the individual defendants permitted to redeem the stock with moneys deposited in court for that purpose. (MR. JUSTICE HOLLOWAY dissenting.)

Receivers—Costs—To Whom Taxable.

4. Costs of a receivership are properly taxable against the party whose wrongful acts made his appointment necessary and at whose instance he was appointed, where no exceptional facts appear which require the court, in the exercise of its discretion, to tax them against the party in whose favor the equities were found.

Appeals from District Court, Cascade County; H. H. Ewing, Judge.

[60 Mont. 132.]

ACTION by the United States Gypsum Company, a corporation, against the Mackey Wall Plaster Company, a corporation, and others. From a judgment for defendants, and an order overruling motion for new trial, plaintiff appeals. Affirmed.

Messrs. Scott, Bancroft, Martin & Stephens and *Messrs. Norris, Hurd & Rhodes*, for Appellant, submitted a brief; *Mr. John E. MacLeish* and *Mr. Leland K. Neeves*, of Counsel. *Mr. Edwin L. Norris* argued the cause orally.

The offer of the Mackeys and the Mackey Company to apply the amount due on the Mackey note upon the purchase price of the Mackey properties under the option contract was not a payment of the note or a tender of payment, and it would not have operated as such even had the said purchase price admittedly been due.

From the beginning of the controversy between appellant and respondents it has been respondents' idea that the Mackeys had the legal right to compel appellant to accept payment of the personal indebtedness of the Mackeys to it by applying the indebtedness to or setting it off against the claim of the Mackey Company against appellant for the purchase price of the Mackey properties under the lease and option contract, and even upon the hearing in the court below respondent Cooper testified that that was still his idea. In the first place, had there been no controversy between appellant and respondents, the Mackey indebtedness could not be paid in the manner in question in the absence of an express agreement to that effect.

"Cross-demands existing between parties cannot operate or be treated as payment with regard to each other without the express assent of both parties." (22 Am. & Eng. Ency. of Law, 2d ed., 526.) The debtor cannot make a creditor a forced purchaser of the property or compel him to exchange his obligation for the property transferred. (*Borland* v. *Nevada etc. Bank*, 99 Cal. 89, 37 Am. St. Rep. 32, 33 Pac. 737; 8 C. J. 574; 30 Cyc. 1187; *Stanwood* v. *Smith*, 3 Ill.

App. 647; *Post* v. *Carmalt*, 2 Watts & S. (Pa.) 70, 37 Am. Dec. 484; *McCurdy* v. *Middleton*, 82 Ala. 131, 2 South. 721.)

In *Kennedy* v. *Davisson*, 46 W. Va. 433, 33 S. E. 291, a debtor attempted to prevent the enforcement of certain liens on the ground that the creditor was his debtor. It was held that the debtor had no right to prevent his creditor from enforcing the liens. The court said: "A setoff is a definite demand, the subject of the cross-action, not a payment." In the same way respondents claim that appellant could not enforce its lien upon the pledged stock because of the alleged cross-demand of the Mackey Company or the Mackeys against appellant.

The foregoing rule applies equally to debts payment of which is otherwise secured. In the same way a cross-demand or setoff is neither payment nor tender of payment. The usual rules pertaining to tender and payment apply to debts secured by pledge. (31 Cyc., p. 582; 22 Am. & Eng. Ency. of Law, 2d ed., pp. 879, 880.)

The offer of the Mackey Company to apply the Mackeys' indebtedness upon its claim against appellant was a mere offer, in no way binding upon appellant and in no way one which appellant was obliged to accept. Its refusal to accept the offer for any reason sufficient to itself could not in the slightest affect its rights under its contract with the Mackeys.

Another good reason exists for the refusal to comply with the Mackeys' demand. It is the law, as we understand it, that officers of a corporation cannot lawfully pay their personal indebtedness with corporate funds, and in many cases payments of that kind have been recovered from the creditor. (See *Anderson* v. *Kissam*, 35 Fed. 699; *Chrystie* v. *Foster*, 61 Fed. 551, 9 C. C. A. 606; *Claflin* v. *Farmers' etc. Bank*, 25 N. Y. 293; *Moores* v. *Citizens' Nat. Bank*, 15 Fed. 141; *Germania Safety Vault & Trust Co.*, v. *Boynton*, 71 Fed. 797, 19 C. C. A. 118; *O'Bannon* v. *Moerschel* (Mo. App.), 222 S. W. 1035; Fletcher, Corp. 2512.)

The sale of the stock was properly had at Chicago. The contract does not in terms prescribe the place of sale, and as we understand it is not customary for such contracts so to prescribe. (*Thornton* v. *Martin*, 116 Ga. 115, 42 S. E. 348; *Morris & Whitehead* v. *East Side R. Co.*, 104 Fed. 409, 43 C. C. A. 605; *Donohoe* v. *Gamble*, 38 Cal. 340, 99 Am. Dec. 399.)

The sale as made was fully authorized by contract. No advertisement of the sale was necessary. Respondents say that the sale of July 22, 1916, was invalid; that the sale should have been "a sale at public auction after due notice to the public." It is no doubt true that in the absence of an agreement to the contrary the pledgee must sell at public sale, and, according to some of the authorities, only after notice to the public. It is entirely competent, however, for the parties to vary the method of sale as fixed by the general law, and in such case the special agreement will control. (Colebrook on Collateral Securities, sec. 86; *McDowell* v. *Chicago Steel Works*, 124 Ill. 491, 7 Am. St. Rep. 381, 16 N. E. 854; *Peacock* v. *Phillips*, 247 Ill. 467, 32 L. R. A. (n. s.) 42, 93 N. E. 415; *Bryson* v. *Rayner*, 25 Md. 424, 90 Am. Dec. 69.)

The appellant in selling out the collateral acted in good faith and with reasonable diligence, and the sale was valid. It is appellant's contention that in selling out the pledged stock and becoming the purchaser thereof in the manner shown by this record, it but exercised a right given it by its contract with the Mackeys, and that "bad faith" and "lack of diligence" cannot be predicated on that fact alone. The exercise of a contract right is not, and cannot be of itself, fraud. (*In re Mertens*, 144 Fed. 818, 75 C. C. A. 548; *Turner* v. *Metropolitan Trust Co.*, 207 Fed. 495, 25 C. C. A. 157; *Leonard* v. *Greer*, 139 Mass. 31, 229 N. E. 215.)

The contract in the case at bar expressly waived the necessity of notice to the public in the event of the sale. Appellant was authorized to sell the collateral upon five days' notice to the Mackeys "without advertising the same or demanding

payment thereof, or giving any further notice." The cases relied upon by respondents, even if they go to the extent claimed, have no application. If the appellant might sell without notice to the public, and without any duty upon it to procure bidders in the first instance, it is idle to claim that it could not lawfully make a sale if it happened to be the only bidder present. (*Turner* v. *Metropolitan Trust Co.*, 207 Fed. 495, 125 C. C. A. 157.) The same may be said as to the sale taking place in Chicago, for a sale there was authorized. In *Winchester Rock etc. Co.* v. *Murdough*, 233 Mass. 50, 123 N. E. 345, a similar contention was made and denied. It was said: "The place of sale was not specified in the agreement and that it was not in Boston cannot be said of itself to be conclusive of bad faith or want of prudence."

It is the law, as we understand it, that a pledgee has a right to sell out the collateral upon default in the payment of the principal obligation. (22 Am. & Eng. Ency. of Law, 2d ed., 885; 31 Cyc. 871; *MacFarland* v. *Liberty Nat. Bank*, 166 N. Y. Supp. 393; *Franklin Bank* v. *Newcombe*, 14 Misc. Rep. 597, 37 N. Y. Supp. 271.)

The authorities sustain our proposition that the sale was not in any way merely colorable, but was a *bona fide* attempt by appellant to liquidate the Mackey indebtedness to such extent as might be possible through a sale. (*Morris & Whitehead* v. *East Side R. R. Co.*, 104 Fed. 409, 43 C. C. A. 605.)

Mere inadequacy of price is not of itself sufficient to affect the validity of the sale. (*Learned* v. *Geer, supra; Farmers' Nat. Bank* v. *Venner*, 192 Mass. 531, 7 Ann. Cas. 690, 78 N. E. 540; *Winchester etc. Brick Co.* v. *Murdough*, 233 Mass. 50, 123 N. E. 325), and our contention here is that the price paid was not inadequate. (*Manning* v. *Shriver*, 79 Md. 41, 28 Atl. 899; *Montgomery Bank & Trust Co.* v. *Jones*, 182 App. Div. 252, 169 N. Y. Supp. 478.)

Messrs. Cooper, Stephenson & Hoover, for Respondent, submitted a brief; ***Mr. Sam Stephenson*** argued the cause orally.

The sale contemplated in this contract was a sale at public auction. There is no provision for a private sale, and the only other kind of sale of stock, or other personal property, which a pledgee can lawfully make in disposing of pledged property, is the sale at public auction.

Such a sale must be held in a public place, after notice to the public which is reasonably calculated to attract bidders, and the sale itself must be conducted as a public sale in the manner customary for sales at public auction. (31 Cyc. 878; 21 R. C. L. 691.) The waiver of notice, in language identical with or similar to the language in the pledge agreement in the present case, was held not to waive public notice but only to waive notice to the pledgor in the following cases: *Laclede Nat. Bank* v. *Richardson*, 156 Mo. 270, 79 Am. St. Rep. 528, 56 S. W. 1177; *Tennant* v. *Union Central Life Ins. Co.*, 133 Mo. App. 345, 112 S. W. 754; *Nagel* v. *Ham, Yearsley & Ryrie*, 88 Wash. 99, 152 Pac. 520.

The sale is invalid because the pledgee failed to exercise reasonable skill and diligence in order to get the value of the property, and on account of bad faith. (*Fitzgerald* v. *Blocher*, 32 Ark. 742, 29 Am. Rep. 6.)

It will not aid the plaintiff to say that it has complied with the terms of the pledge agreement, and that its obligation ceases with such compliance. The cases cited below are all cases where the power was exercised in compliance with the terms, but where the obligation imposed by law upon the pledgee to so exercise the power as to obtain the best possible price required some other and further acts without which its sale is invalid. (*Montague* v. *Dawes*, 14 Allen, 369; *Drinnan* v. *Nichols*, 115 Mass. 353; *Clark* v. *Simmons*, 150 Mass. 357, 23 N. E. 108; *Foote* v. *Utah Commercial & Sav. Bank*, 17 Utah, 283, 54 Pac. 104; *Muhlenberg* v. *City of Tacoma*, 25 Wash. 36, 64 Pac. 925.) If the plaintiff had really been desirous of obtaining

the full value of this stock, in the first place it would have sold this stock at Great Falls, Montana. (*Ginsburg* v. *Downs Co.*, 165 Mass. 467, 52 Am. St. Rep. 525, 43 N. E. 195.) A pledgee's sale must have something more than mere form in order to endow it with the sanctity of legality. It must be conducted under such conditions as to afford reasonable assurance that a price will be obtained fairly commensurate with the value of the thing sold.

Since the two Mackeys owned all of the shares of stock of the Mackey Wall Plaster Company except one share, which the evidence shows was also at their disposal and in accord with their wishes, they were the equitable owners, by virtue of such stock, of the debt which appellant owed to the Mackey Wall Plaster Company as the purchase price of the Mackey properties, and equitably they were entitled to have that debt paid in manner and form as they sought to have it, for courts of equity are endowed with the power, when its use is necessary, to look through the envelope of corporate entity to the stockholders themselves and protect them from spoliation at the hands of greed. This is held in the case of *Camp* v. *Gress* by the United States supreme court, wherein the court approved of a charge made by the trial court to the effect that the holders of the corporate stock were the equitable owners of the property represented by the stock. (See *Camp* v. *Gress*, 250 U. S. 308, 63 L. Ed. 997.)

MR. JUSTICE REYNOLDS delivered the opinion of the court.

United States Gypsum Company, a corporation, commenced action against defendants in order to have it judicially determined that it is a stockholder in the Mackey Wall Plaster Company, a corporation, and that the Mackey Company became and was dissolved. Complaint prayed that the present trustees, acting by virtue of the statute, be removed and other persons be appointed in their stead; that the affairs of the

company be wound up and its property and assets distributed among those entitled thereto, including plaintiff. Plaintiff also asked for the appointment of a receiver to take charge of the property and assets of the company pending final determination of the suit, which receiver was appointed. Judgment was entered in favor of defendants. Motion for new trial was made and overruled. Appeals have been taken from the judgment, the order overruling motion for new trial, and from order denying motion of plaintiff to strike from the memorandum of costs the compensation and expenses of the receiver. [1] The appeal from the latter order is superfluous, as any error in taxation of costs is reviewable on appeal from the judgment.

Upon the fifteenth day of June, 1909, the Mackey Company possessed certain gypsum mining properties and a mill at or near Great Falls. Upon that date it leased to plaintiff for one year all its properties at a rental of $3,000. The lease provided that it might be renewed for a further period of five years at the option of plaintiff, and contained a provision giving plaintiff the privilege of purchasing the leased properties for $50,000 of which $15,000 was to be paid in cash and the balance in notes to mature at fixed intervals. On July 1, 1910, the lease was renewed for a further period of five years. On July 6, 1915, another agreement was made extending the lease for an additional year upon the same terms as before, except that the option feature of the agreement was modified whereby it was provided that plaintiff should purchase the premises for $50,000 upon terms above mentioned, unless plaintiff gave to the Mackey Company at least sixty days' written notice prior to July 1, 1916, that it would not purchase the same. The property so leased constituted all of the properties of the Mackey Company. A. D. Mackey and Myra Post Mackey, his wife, were the owners of all of the capital stock of the Mackey Company, but one share was held in the name of Ransom Cooper and one share in the name of Margaret

Innes. Nothing was paid by Margaret Innes and Ransom Cooper for the stock held by them respectively, such stock being issued to them presumably for the purpose of maintaining the organization.

On the nineteenth day of April, 1916, O. M. Knode, then manager of the gypsum company, wrote to A. D. Mackey, informing him: "That conditions in Montana at this time are such that it will be necessary for us to cancel our arrangement with you at the time of its expiration, which is July 5." In the same letter he stated that the gypsum company would give formal notice of its intention not to purchase the plant upon the fifth day of May. No further written notice, however, was ever given prior to the sixty days' limit. On the 14th of July, 1915, A. D. Mackey and Myra Post Mackey made a loan of $8,000 of the gypsum company and assigned to the latter 198 shares of the capital stock of the Mackey Company as security for payment of the loan. The note evidencing the loan contained the pledge agreement reading as follows:

"$8,000. July 14, 1915.

"On or before one year after date, for value received, we promise to pay to the order of the United States Gypsum Company the sum of eight thousand dollars at the office of the United States Gypsum Company, in Chicago, Illinois, with interest at the rate of six per cent per annum after July 14, 1915, and we have deposited with the said United States Gypsum Company as collateral security one hundred ninety-eight (198) shares of the capital stock of the Mackey Wall Plaster Company, a Montana corporation, which we hereby give the United States Gypsum Company, its agent or assignees, authority to sell, or any part thereof, on the maturity of this note, or at any time thereafter, upon first giving to us five days' notice in writing of the intention to sell said securities, such notice to be given by depositing the same in the United States mails addressed to us at the city of Great Falls, county of Cascade, state of Montana; that after such notice shall have

been given, and at the end of the time therein stated, the said United States Gypsum Company, its agents or assignees, without advertising the same or demanding payment thereof, or giving any further notice, may sell said collateral or any part thereof, and apply so much of the proceeds thereof to the payment of this note as may be necessary to pay the same, with all interest due thereon, and also to the payment of all expenses attending the sale of said collateral, including attorneys' fees, and in case the proceeds of the sale of said collateral shall not cover the principal, interest and expenses, as aforesaid, we promise to pay the deficiency forthwith after such sale. And at any sale of said collaterals, or any part thereof, made by virtue hereof, it shall be optional with the legal owner or holder of this note to bid for and purchase said collaterals or any part thereof."

On the fifth day of July, 1916, the Mackey Company, by A. D. Mackey, assuming that the gypsum company had elected to purchase the plant, wrote to the latter company forwarding a deed, fully executed, conveying the Mackey properties to plaintiff and forwarding an assignment of all the stock of the Mackey Company except the 198 shares above mentioned, then in the possession of the gypsum company; the contract giving the gypsum company the option of taking either the property or the stock. In this letter it was expressly stated that plaintiff should deduct the amount of the indebtedness of A. D. Mackey and Myra Post Mackey due plaintiff upon their note, from the cash payment of $15,000 due on purchase price. The deed and assignment were returned by plaintiff, with letter under date of July 11, 1916, in which plaintiff denied any obligation to purchase the property, made reference to the note of A. D. Mackey and Myra Post Mackey, and stated that payment of same would be expected at maturity. On the fifteenth day of July, 1916, being the day following the maturity of the note, the gypsum company mailed a notice to A. D. Mackey and Myra Post Mackey, addressed to them at Great Falls, Mon-

tana, notifying them that the 198 shares of stock would be sold upon the twenty-second day of July, 1916, in Chicago, and the proceeds thereof applied in accordance with the terms of the note. By reason of the fact that the Mackeys were not at Great Falls at the time, they did not receive notice of the proposed sale until after the time mentioned for the sale. On July 22, in pursuance of the notice, the sale was held, and there being no other bidders, the gypsum company made a sale of the stock to itself for the sum of fifty cents a share, or a total consideration of $99. On July 26, 1916, the gypsum company mailed a letter to the Mackeys advising them that the sale had been made of the stock for the sum of $99, and making demand for the payment of the deficiency upon the note. On the 1st of August, 1916, Mackey Wall Plaster Company brought suit in the federal court to enforce specific performance of the contract to purchase the properties of the company, resulting in a decree in favor of the Mackey Company in the district court, which was affirmed by the circuit court of appeals June 10, 1918, the case being reported in 252 Fed. 397, 164 C. C. A. 321. Thereafter this suit was brought to establish the rights of the gypsum company as owner of the 198 shares of capital stock.

The defendants contend that the sale of stock to the gypsum company was void for several reasons, and that, even if not void, its conduct in the matter of forcing the sale was so inequitable and unconscionable that it is not in a position to receive the aid of a court of equity in establishing its ownership to the stock.

The pledge agreement as contained in the note is clear and unambiguous in its terms, although it might be harsh in its operation. We have carefully examined the several contentions made by defendants as to the validity of the sale, and we are unable to find that the manner of conducting the sale was not in conformity with the contract or in fulfillment of the obligations of the gypsum company as pledgee. However, we are satisfied that under the circumstances of the case the sale was

unnecessary and inequitable. The note held by the gypsum [2] company was given by A. D. Mackey and Myra Post Mackey, his wife, who owned all the stock of the Mackey Wall Plaster Company. The business of the company was in fact the business of the Mackeys, and *vice versa*. The corporation, although maintaining the form of legal existence, was, in effect, merely the name under which A. D. Mackey and Myra Post Mackey were doing business. This fact was evidently known to the gypsum company, for at the time the note was given to the gypsum company, the Mackeys offered to secure it by the entire capital stock of the Mackey Company; but the gypsum company being satisfied with only 198 shares of stock as collateral, no more stock was pledged. It has been held by this court that where the stock of a corporation is owned by one person, whereby the corporation functions only for the benefit of such individual owner, the corporation and the individual should be deemed to be the same. (*Edwards* v. *Plains Light & Water Co.*, 49 Mont. 535, 143 Pac. 962; *Barnes* v. *Smith*, 48 Mont. 309, 137 Pac. 541; *Hanson Sheep Co.* v. *Farmers' & Traders' State Bank*, 53 Mont. 324, 163 Pac. 1151.) In the *Hanson Sheep Company Case*, above mentioned, it was held that under ownership of the capital stock similar to that involved in this case it is proper for the individual to use the corporate assets in discharge of his individual indebtedness. Such a case is an exception to the general rule that an officer of a corporation cannot use the corporate funds in payment of his personal obligations. Thus the Mackeys had the right to use the corporate funds to pay their personal obligations, for they were the corporation.

At the time of the maturity of the note, the gypsum company [3] was indebted to the Mackey Company in the sum of $50,000, of which $15,000 was immediately due, more than enough to satisfy the note. The Mackeys had the right to authorize the gypsum company to deduct from the payment due from it to the Mackey Wall Plaster Company the amount due upon the note. This offer was not a legal tender, nor did it

constitute payment of the note; nevertheless, it did afford to the gypsum company an opportunity of receiving full payment for the note without the necessity of making a sale of the stock. The two obligations constituted counter demands, and, in a proper action in court, one could have been offset as against the other. The fact that the gypsum company denied its obligation is immaterial upon this phase of the case, inasmuch as the obligation existed regardless of such denial. However, without waiting to find out by decree of the court whether or not it was liable to purchase the plant, it chose to proceed forthwith under the power of sale contained in the pledge contract. It is obvious that in such proceeding no opportunity whatever was given to the Mackeys to offset their claim. It has been held that where there has been no opportunity to make offset of claim by reason of the act of the other party, equity will intervene in order that justice may be done. (34 Cyc. 634; *Garvin* v. *Squires*, 9 Ark. 533, 50 Am. Dec. 224.)

Not only did the Mackeys offer to permit the note to be offset against the purchase price, but they kept their offer good by the allegations of their complaint in the federal court action, and by deposit of funds with the clerk of the court in this action, sufficient to satisfy the amount due on the note exclusive of the $99 credit given on the sale. Under these circumstances, it seems to us unconscionable to permit the gypsum company to hold the stock, of a value of over $19,000, and also collect the note against the Mackeys with a nominal indorsement of $99 upon it, when the interest of all parties could have been conserved if the gypsum company had either acknowledged its debt or given the Mackeys an opportunity to litigate their claim as an offset against the note. The maxim, "He who seeks equity must do equity," applies. A court of equity cannot aid a litigant in establishing a claim based upon inequitable, unfair and unconscionable conduct, and therefore this court must refuse to assist the plaintiff in establishing its title secured through a sale under circumstances as above set forth. The sale

having been made by plaintiff to itself, the situation should be deemed the same as though no sale had been made, and defendants should have the privilege of redemption with the moneys deposited in court for that purpose.

It is contended by plaintiff that the costs of the receivership [4] were improperly taxed against it by the trial court. The rule governing the taxation of such costs is clearly set forth in *Ervin* v. *Collier*, 2 Mont. 605, and has been followed by numerous cases since. In that case the rule is stated as follows: "This is a case in equity and the taxation of the costs rests in the sound discretion of the court. * * * There are no exceptional facts in this case which require the court, in the exercise of a legal discretion, to tax the costs of the receiver against the party in whose favor all the equities were found. It does not matter how or why the receiver was appointed. He is entitled to his costs, which were taxable in this action. No application was made for his removal and no exception was taken to his report and we presume that he was appointed legally and performed his duty faithfully. His compensation should come from the party whose wrongful acts made his appointment necessary in order to preserve the property during the litigation." Plaintiff recognizes the rule above mentioned, but insists that in its application to this case, the costs should be taxed against defendants. However, by reason of the view we take of the equities involved in this case, it is our opinion that the trial court exercised the proper discretion in taxing the costs of the receivership against plaintiff.

Several other alleged errors are assigned but in view of the disposition of the issues already discussed, it becomes unnecessary to consider any other assignments.

The judgment and order overruling motion for new trial are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES COOPER and GALEN concur.

MR. JUSTICE HOLLOWAY: I dissent. It is conceded in the majority opinion that the sale of the pledged stock was in all respects regular and according to the terms of the pledge agreement and in conformity with the provisions of our statute (Rev. Codes, secs. 5774–5799). The pledgors did not redeem the pledged property before sale, for it is conceded that they did not pay or tender payment of the amount of the debt. These propositions are elementary: (a) A valid sale of pledged property passes title to the purchaser, and (b) cuts off the right of redemption. The plaintiff then became the owner of the shares theretofore pledged to it, and as such is entitled to all the rights and privileges pertaining to such ownership.

Rehearing denied June 20, 1921.

CURREY, RESPONDENT, *v.* BUTTE ELECTRIC RY. CO., APPELLANT.

(No. 4,381.)

(Submitted April 21, 1921. Decided May 23, 1921.)

[199 Pac. 243.]

Verdicts—Setting Aside—Jurisdiction—Correcting Minutes.

Trial—Actions—Motions—Nature, How Determined.

1. As the nature of an action must be determined by the pleadings, regardless of the designation given it by the parties, so an order granting a motion must be judged by its effect rather than by its wording.

Verdict—Order Setting Aside Under Guise of Correcting Minutes, Void.

2. *Held*, that a verdict arrived at, received and filed in regular manner, eight of the jurors, upon their poll, answering in the affirmative, could not be set aside on motion, supported by the affidavit of one of them to the effect that he had answered in the negative, asking specifically that it be set aside, under the pretension that its purpose was merely to correct the minutes of the court.

Appeal from District Court, Silver Bow County; Edwin M. Lamb, Judge.

[60 Mont. 146.]

ACTION by Annie Currey against the Butte Electric Railway Company. Verdict for defendant, and from an order setting aside the verdict and striking from the files the judgment, defendant appeals. Order reversed and cause remanded, with directions to reinstate the judgment.

Mr. John L. Templeman, Mr. Peter Breen and *Mr. Fred. J. Furman*, for Appellant, submitted a brief; *Mr. Sydney Sanner*, of Counsel, argued the cause orally.

An affidavit by a juror seeking to impeach a verdict cannot be considered. (*State* v. *Beesskove*, 34 Mont. 41, 85 Pac. 376; *State* v. *Lewis*, 52 Mont. 504, 159 Pac. 415; *Spencer* v. *Spencer*, 31 Mont. 639, 79 Pac. 320; *Sutton* v. *Lowry*, 39 Mont. 471, 104 Pac. 545; *People* v. *Baker*, 1 Cal. 404; 29 Am. & Eng. Ency. of Law, 1008, 1009.)

The judgment cannot be attacked by motion, but, if at all, must be done on direct proceedings to annul the judgment. The motion is wholly insufficient to support the order of the court or to set aside the judgment. The purpose of the motion is not supported by law or statute. We readily concede that the court has authority, in term or out of term, to make its minutes conform to the facts, but this judgment is regular upon its face, and the proceedings in connection with the rendition of the judgment were in conformity with the law, and regular, and such a judgment cannot be set aside on motion. This matter has been before the court on other occasions. (*State ex rel. Happel* v. *District Court*, 38 Mont. 166, 129 Am. St. Rep. 636, 35 L. R. A. (n. s.) 1098, 99 Pac. 291; *Foster* v. *Hauswirth*, 5 Mont. 566, 6 Pac. 19.)

Mr. William Meyer and *Mr. Harry Meyer*, for Respondent, submitted a brief; *Mr. Harry Meyer* argued the cause orally.

Appellant contends "that it is contrary to law and public policy to consider the juror's affidavits." The affidavits in this case are not used, as a reading of the authorities hereafter quoted will show, to impeach the verdict. They

are used merely to correct the minutes of the court and an irregularity and to set aside a verdict illegal under the Constitution and the laws of the state of Montana. The verdict in itself is but a mere expression or evidence of some mental conception, and hence a correction of such a writing is not an impeachment of the verdict itself. The question of the use of affidavits in correcting such a mistake and irregularity as occurred in this action by the affidavits of jurors has been decided a great many times. (See *Peters* v. *Fogarty*, 55 N. J. L. 386, 26 Atl. 855; *Wolfgram* v. *Town of Schoepke*, 123 Wis. 19, 3 Ann. Cas. 398, 100 N. W. 1054; *Edminston* v. *Garrison*, 18 Wis. 595, 603; *Woodward* v. *Leavitt*, 107 Mass. 498, 9 Am. Rep. 49.)

There are a number of decisions drawing a distinction between the proceedings involved in reaching and agreeing upon the verdict and the mere act of expressing it, either orally or in writing. The following cases recognize such distinction, and hold that the reasons excluding jurors' testimony as to their conduct in the former stage do not exclude their evidence as to what really was the verdict agreed on in order to prove that it has not been correctly expressed, through mistake or otherwise. (*Murdock* v. *Sumner*, 22 Pick. (Mass.) 156; *Randall* v. *Peerless Motor Car Co.*, 212 Mass. 352, 99 N. E. 221; *Capen* v. *Stoughton*, 16 Gray (Mass.), 465; *Karrick* v. *Wetmore*, 210 Mass. 578, 579, 97 N. E. 92; *Dalrymple* v. *Williams*, 63 N. Y. 361, 20 Am. Rep. 544; *Hamburg-Bremen Fire Ins. Co.* v. *Pelzer Mfg. Co.*, 76 Fed. 479, 22 C. C. A. 283.)

Cases very much in point and considering many of the cases herein cited and the direct point in question being decided in favor of our contention are: *Wirt* v. *Reid*, 138 App. Dec. 760, 123 N. Y. Supp. 706; *Pelzer Mfg. Co.* v. *Hamburg Fire Ins. Co.*, 71 Fed. 826; *Saylor* v. *Taylor*, 77 Fed. 479, 23 C. C. A. 343. Cases approved by the authorities and courts upon this question are: *Hodgkins* v. *Mead*, 5 N. Y. Supp. 433; affirmed, 119 N. Y. 166, 23 N. E. 599; *Jackson* v. *Dickenson*,

15 Johns. (N. Y.) 309, 8 Am. Dec. 236; *Dearborn* v. *Newhall*, 63 N. H. 301; *Burlingame* v. *Central R. Co.*, 23 Fed. 706, 23 Blatchf. 142.

Under the above authorities and citations, the order in this case was properly made and was within the jurisdiction of the court, and the cases from our state upon the question as to affidavits of jurymen are not in point in dealing with the matter before the court.

Appellant contends that the judgment in this case cannot be attacked by motion, but if at all, must be done by a direct proceeding to annul the judgment. This proceeding was for the purpose of correcting an irregularity and a mistake made by the clerk in his minute entry which counsel concede the court had a right on its own motion to correct. In *Buhler* v. *Loftus*, 53 Mont. 546, 165 Pac. 601, this court said: "Where it is sought to set aside a judgment on the ground of irregularity, a motion in the case, and not a new action, is the appropriate remedy." The leading case upon this question is that of *Kaufman* v. *Shain*, 111 Cal. 16, 52 Am. St. Rep. 139, 43 Pac. 393. A motion is proper in a case of this kind under section 6589, Revised Codes. Under similar statutes, motions of this kind have been held proper. (*Norton* v. *Atchison, T. & S. F. R. Co.*, 97 Cal. 388, 33 Am. St. Rep. 198, 30 Pac. 584, 32 Pac. 452; *Stark Bros.* v. *Glaser et al.*, 19 Okl. 502, 91 Pac. 1041; *Stark Bros.* v. *Royce*, 44 Wash. 287, 87 Pac. 340; see, also, *Comanche Min. Co.* v. *Rumley*, 1 Mont. 201; *Power & Bros.* v. *Turner*, 37 Mont. 521, 97 Pac. 950; *Union Compress Co.* v. *Leffler*, 122 Ga. 640, 50 S. E. 483; *Leavell* v. *Carter*, 123 Ky. 459, 96 S. W. 597; *Scott* v. *Mutual P. S. F. L. Assn.*, 137 N. C. 515, 50 S. E. 221; *Fred Heim Brewing Co.* v. *Hamilton*, 137 Iowa, 376, 114 N. W. 1039; *White* v. *McFarland*, 148 Mo. App. 338, 128 S. W. 23.)

MR. COMMISSIONER SPENCER prepared the opinion for the court.

This is an action for damages for personal injuries. The record shows that on November 12, 1918, the jury returned

into court with their verdict in favor of the defendant, which was filed and read by the clerk; that, after being so filed and read, the court inquired of the jury, "Is this your verdict?" and received an affirmative response; that upon motion of plaintiff, and in the presence of plaintiff and his counsel, the jury was polled, eight answering in the affirmative and four in the negative. The jury was thereupon excused. On November 14, judgment in favor of defendant was duly and regularly made and entered, and on the same day notice thereof given; that upon the same day plaintiff filed motion, notice of motion, and affidavits of five jurors in support thereof, to set aside the verdict, which motion was heard on November 16, 1918. On November 16, the defendant filed its motion and affidavits in support thereof, to strike the affidavits of plaintiff from the records and files, and, on November 22, the court made its order as follows (omitting formal parts): "That the journal entry containing the minutes of the proceedings had in the above-entitled action, and the minutes regarding the number of jurors who agreed to the verdict heretofore filed in the above-entitled action on the twelfth day of November, 1918, be and the same is hereby ordered corrected so that said minutes show the true facts, *viz.*, that, upon said jury being polled, seven answered that they were in favor of said verdict, and that the verdict as filed was their said verdict, and that five then and there in open court announced that the said verdict as filed was not their verdict, and that they did not agree to said verdict; and it further appearing to the court that said verdict heretofore filed in the above-entitled action on the twelfth day of November, 1918, was not agreed to or concurred in by eight of the jury trying said cause, and that said verdict should not have been received and filed. It is hereby ordered, and this does order, that said verdict be set aside and stricken from the files in the above-entitled action; and, it further appearing to the court that no legal verdict was rendered in the above-entitled action, and that no verdict such as is contem-

plated by law and by the statutes of this state was filed in the above-entitled action, and it further appearing that the judgment heretofore signed, filed and rendered in the above-entitled action is void, because not based upon any proper verdict; it is hereby ordered, and this does order, that the judgment heretofore signed and filed on the fourteenth day of November, 1918, be and the same is hereby annulled, set aside and ordered stricken from the files of the above-entitled action; and it further appearing to the court that the above-entitled action is at issue, and ready for trial, it is hereby ordered that said action be, and the same is, hereby ordered placed upon the trial calendar of the above-entitled court."

It is further disclosed by the record that, during the argument of counsel for the plaintiff in support of plaintiff's motion to set aside the verdict, Hon. E. M. Lamb, presiding judge, stated that he knew that one of the five, namely, Juror T. F. Hickey, when his name was called, had voted "Yes," but that thereafter he had followed up the said response by some muttered words which the court did not get. No controversy arises over the vote of Jurymen Murphy, Sullivan, Carron and Burke upon the poll of the jury, and only the vote of Juryman T. F. Hickey is in issue upon this appeal. Defendant appeals from the order setting aside and striking the verdict from the files and annulling and striking from the files the judgment.

Stripped of all incidental persiflage, the situation confronting [1, 2] us is that respondent sought to set aside a verdict of the jury which in all particulars had been arrived at, received, and filed in regular and legal manner and form. Basing his motion upon the affidavits of jurymen who tried the case, the verdict was set aside and ordered stricken from the files and the judgment annulled and stricken from the files, by order of the court, under the guise of "correcting its minutes." Notwithstanding respondent "moves the court to set aside the verdict," he now contends that was not the purpose of his motion, but the true object to be attained was

simply the correction of the court minutes. We cannot accept respondent's view of the situation. The actual result of the procedure herein was the accomplishment indirectly of that which could not be accomplished directly. The nature of a lawsuit must be determined by the pleadings themselves, regardless of the designation given to the action by the parties thereto. (*St. John* v. *Tainter*, 56 Mont. 204, 182 Pac. 129.) A motion to set aside a verdict is, none the less, such when the only object sought and attained is the setting aside of the verdict, though masquerading in the garb of an order to correct the minutes. But, viewed from the respondent's standpoint, did the order of the court correct its minutes so that the true facts were spoken? Or did it change the minutes in substance, and by what power? The conceded facts are that the verdict was arrived at, received, and recorded by the clerk in legal manner and form, the jury polled, eight answering in the affirmative, and four in the negative, and the jury discharged. These facts appear in the minutes of the clerk; they were the actual facts as then understood by the court; and were entered and were intended to be entered as such. The court heard Juror Hickey answer in the affirmative. Confronted with this record, we think the following will establish the fact that the court did not correct, but changed its minutes in substance, and without power so to do.

Ruling Case Law lays down the general rule that: "In the exercise of this power of amendment, the court is not, however, authorized to do more than to make its records correspond to the actual facts, and cannot, under the form of an amendment of its records, correct a judicial error, or make of record an order or judgment that was never in fact given." (7 R. C. L., sec. 47, p. 1020.)

Corpus Juris enunciates substantially the same doctrine thus: "In case of an omission or error in the record the power exists in the court to amend such record so that it shall conform to the actual facts and truth of the case; but a court cannot amend its record to correct a judicial error, or to

remedy the effect of judicial nonaction." (15 C. J. 975, sec. 395.)

The supreme court of Massachusetts condemned similar action of the lower court upon a record almost identical with the one before us as follows: "The power of a court to correct clerical errors in its records arising from misprision of the clerk, improvidence of jurors, failure of commissioners to express their decision, or otherwise, is ample. [Citations.] But no clerical error appears here. There is no doubt that the docket memorandum of dismissal, minuted as the case was called, was made intentionally, although it might not have been made if the whole record respecting the case had been in the mind of the court. But that which was done was intended to be done, and the entry of judgment of dismissal in July, 1899, was the exact entry intended to be made. There was no clerical error. There was no failure to make the written record correspond with the decision actually made.

"The facts as they now appear did not authorize the action of the court in June, 1899, in dismissing the case, nor in entering judgment in the following July. But such action was within the jurisdiction of the court. That it was done is attested by the records. The record of the clerk imports verity in this regard. That there were facts in existence which made it error as matter of law to enter the particular judgment is nothing more than happens in many instances where judgments of lower courts are reversed. There were ample remedies at hand, if seasonably taken, to protect the plaintiff. Perhaps he might have appealed; he certainly might have petitioned for relief through one of the channels afforded by the statutes." (*Karrick* v. *Welmore* (1912), 210 Mass. 578, 97 N. E. 92.)

The supreme court of Oregon approves the general rule in the following language: "A journal entry is the prescribed memorial of what the court actually did. It must speak the real truth. If the court did not in fact make an order on the earlier date, one cannot be supplied by any subsequent

journal entry. Moreover, the authority to make an order *nunc pro tunc* cannot be used to amend or change the order actually made." (*White* v. *East Side Mill Co.*, 84 Or. 224, 161 Pac. 969.)

In California, by an elaborate digest of authorities, the rule has been adopted thus: "Every court of record has the inherent right and power to cause its acts and proceedings to be correctly set forth in its records. The clerk is but an instrument and assistant of the court, whose duty it is to make a correct memorial of its orders and directions; and, whenever it is properly brought to the knowledge of the court that the record made by the clerk does not correctly show the order or direction which was in fact made by the court at the time it was given, the authority of the court to cause its records to be corrected in accordance with the facts is undoubted. (*In re Wight*, 134 U. S. 136, 33 L. Ed. 865, 10 Sup. Ct. Rep. 487 [see, also, Rose's U. S. Notes]; *Balch* v. *Shaw*, 7 Cush. 282; *Fay* v. *Wenzell*, 8 Cush. 315; *Frink* v. *Frink*, 43 N. H. 508; *Crim* v. *Kessing*, 89 Cal. 486, 23 Am. St. Rep. 491, 26 Pac. 1074.) In the exercise of this power the court is not, however, authorized to do more than to make its records correspond to the actual facts, and cannot, under the form of an amendment of its records, correct a judicial error, or make of record an order or judgment that was never in fact given." (*Kaufman* v. *Shain*, 111 Cal. 16, 52 Am. St. Rep. 139, 43 Pac. 393; *People* v. *Ward*, 141 Cal. 628, 75 Pac. 306.)

In Louisiana, the court says regarding correction of minutes that, not being errors of substance, correction could be made. (*State* v. *Bouline*, 107 La. 454, 31 South. 885.) The question whether an amendment shall be allowed is usually one of fact for the court, yet the question whether it can be allowed is one of law. (*Town of Jaffrey* v. *Smith*, 76 N. H. 168, 80 Atl. 504–509.)

From the foregoing, and many other authorities, which we deem it needless to cite, the rule is almost universal that the

court has the inherent right to correct its minutes so that they may state the true facts, but that it is without power to supply judicial nonaction or to change its minutes in substantive matter, or in any matter, except as to an existing fact, nor can a judicial error be obviated by a correction in its minutes. The instant case is squarely within the rule herein enunciated from which we conclude that the order of the court changed the substance of its minutes, and was not a correction to show the true state of facts, because the facts were correctly stated in first instance, and the court was without authority to make its order, and that its action, if anything, after the discharge of the jury became judicial error, which could only be corrected by appropriate method on appeal.

The eminent counsel for appellant, by elaborate and exhaustive brief and oral argument, assign error of the court (1) in considering the affidavits of jurymen in impeachment of their own verdict, (2) in setting aside the verdict, and (3) annulling the judgment. We think the assignments of error are meritorious. The method of attacking the verdict adopted by respondent has been so repeatedly condemned by this court as to require no further consideration. (*State* v. *Beesskove*, 34 Mont. 41, 85 Pac. 376; *Harrington* v. *Butte, Anaconda & Pac. Ry. Co.*, 36 Mont. 478, 93 Pac. 640; *Lish* v. *Martin*, 55 Mont. 582, 179 Pac. 826.) The circuitous method of correcting the court minutes is of no avail to accomplish the well-defined purpose of the respondent.

For the reasons herein stated, we recommend that the order of the court correcting its minutes, setting aside the verdict, and annulling the judgment, be reversed, and that this cause be remanded to the district court, with directions to vacate and set aside said order, and reinstate the judgment in favor of defendant.

PER CURIAM: For the reasons given in the foregoing opinion, it is ordered that the order of the court correcting its minutes, setting aside the verdict, and annulling the judgment, be reversed and the cause remanded to the district court, with direc-

tions to vacate and set aside said order, and reinstate the judgment in favor of defendant.

Reversed and remanded.

Rehearing denied July 2, 1921.

BUCKHOUSE, APPELLANT, *v.* PARSONS, RESPONDENT.

(No. 4,380.)

(Submitted April 21, 1921. Decided May 23, 1921.)

[198 Pac. 443.]

Attorney and Client — Husband and Wife — New Trial — Appeal and Error.

New Trial—Motion Lies, When.

1. A motion for a new trial lies where an issue of fact was wrongfully or erroneously determined by the jury or by direction of the court.

Same—Directed Verdict—Motion by Both Parties.

2. Where both parties moved for a directed verdict, thus in effect submitting the cause upon an agreed statement of facts, the court may nevertheless grant the defeated party a new trial if it deems the verdict as directed by it erroneous.

Same—When Proper.

3. A motion for new trial because of insufficiency of evidence to justify the verdict moves the discretionary powers of the court, while one based on alleged error of law, occurring at the trial and excepted to by the defendant, presents a question of strict legal right, but in either case the granting of the motion, if sustained by the record, is proper.

Husband and Wife—Authority of Wife to Employ Counsel for Husband.

4. Under section 6480, Revised Codes, providing that if a husband and wife be sued together the wife may defend for her own right, and if the husband neglects to defend, she may defend for his right also, a wife, pending suit for divorce brought by her, had authority to employ counsel on behalf of her husband, in a suit for partition against both of them in which he had failed to appear.

Same—Attorney and Client.

5. An attorney who had been employed by the wife of a husband who had deserted her, to represent him in a partition suit against both, could lawfully pay to the wife the amount awarded to the husband, and was not liable to the latter therefor.

Appeal from District Court, Missoula County; Asa L. Duncan, Judge.

[60 Mont. 156.]

ACTION by Donald Buckhouse against Harry H. Parsons. From an order granting defendant's motion for new trial after verdict directed for plaintiff, he appeals. Affirmed.

Messrs. Madeen & Russell, for Appellant, submitted a brief; *Mr. Chas. A. Russell* argued the cause orally.

Where both parties, plaintiff and defendant, submit the cause to court at the close of all the evidence as undisputed, as was done in this case, it is in legal effect submitting case on an agreed statement of fact as has been held by this court, and upon that state of the record a motion for new trial will not lie, and it was error to sustain the motion in this case.

The supreme court of Oklahoma, in *Durant* v. *Nesbit,* 59 Okl. 11, 157 Pac. 353, held that: "Where a case is tried upon an agreed statement which eliminates all questions of fact, a motion for a new trial is unauthorized by statute." (*Sevier* v. *Hopkins,* 101 Wash. 404, 172 Pac. 550; *Duncan* v. *Great Northern Ry. Co.,* 17 N. D. 610, 118 N. W. 826; *De Burg* v. *Armenta,* 22 N. M. 443, 164 Pac. 838; *Conkling* v. *Knights and Ladies of Security,* 183 Iowa, 665, 166 N. W. 384; *Gray* v. *Central Minnesota Immigration Co.,* 127 Iowa, 560, 103 N. W. 792.)

This court has in effect affirmed this rule in the following language: "In a trial to the court where there is no substantial conflict in the evidence, it remains only for the court to determine the question of law arising upon all the evidence, viewed as an agreed statement of facts." (*Milwaukee Land Co.* v. *Ruesink et al.,* 50 Mont. 489, 148 Pac. 396; *Old Kentucky Distilling Co.* v. *Stromberg-Mullins Co.,* 54 Mont. 285, 169 Pac. 734.)

It was contended upon the argument in the court below that the wife, by reason of the marital relation, possessed the implied power, not only to employ respondent as attorney, but also to authorize him to pay her the money in question, and that such payment relieved respondent of all liability for his acts. It is to be noted in the first place that at the time of

the employment, and subsequently, the respondent occupied the position of an attorney for the wife in prosecuting an adverse claim against the appellant, and that the said Fleety Smith to all intents and purposes had severed the marital relations by suing for divorce, *etc.*, that by reason thereof, the relation of confidence and agency between husband and wife no longer existed, and that her sole and only power and authority was by virtue of the written instrument.

In the leading case of *Benjamin* v. *Benjamin*, 15 Conn. 347, 39 Am. Dec. 384, the court in the headnote says: "Implied authority of wife left in charge of husband's farm to manage and superintend the same during his absence from the state does not enable her to bind him by agreement to permit a creditor having an attachment against the husband to cut, remove and sell on execution, grain growing on the land and, notwithstanding such agreement, the husband may maintain trespass against the creditor." This case contains a very full and thorough discussion of the rights and powers of a wife in relation to husband's property, and shows clearly that the action of respondent in this case was unwarranted, and is the leading case cited by all the courts upon that question. For additional authorities see: *Wells* v. *Seely*, 47 Hun, 109; *Terry* v. *St. Stephens P. E. Church*, 79 App. Div. 527, 81 N. Y. Supp. 119; *Butts* v. *Newton*, 29 Wis. 632; *Steffens* v. *Nelson*, 94 Minn. 365, 102 N. W. 871; 21 Cyc. 1234.

Mr. Chas. H. Hall and Mr. A. N. Whitlock, for Respondent, submitted a brief; *Mr. Whitlock* argued the cause orally.

It is contended by the appellant that where both parties make a motion for directed verdict, it is, in effect, an agreement that the evidence is free from conflict and that the case must be determined by the trial court. While there is some authority for this proposition, the decided weight of authority is opposed to it. We cite the following cases, all of which clearly hold that in the respective jurisdictions in which they were decided no such rule prevails: *Smith* v.

Hutchinson Box Board & P. Co., 101 Kan. 274, 166 Pac. 484; *Breckin* v. *McGannon*, 137 Tenn. 207, 192 S. W. 922; *German Savings Bk.* v. *Bates Co.*, 111 Iowa, 432, 82 N. W. 1005; *Elder* v. *Woodruff Hardware Co.*, 16 Ga. App. 255, 85 S. E. 268; *Hayes* v. *Kluge*, 86 N. J. L. 657, 92 Atl. 358; *Hogan* v. *Milburn*, 44 Okl. 641, 146 Pac. 5; *Midland Valley R. Co.* v. *Lynn*, 38 Okl. 695, 135 Pac. 370; *Hite* v. *Keene*, 149 Wis. 207, Ann. Cas. 1913D, 251, 135 N. W. 354; *Strauff* v. *Bingenheimer*, 94 Minn. 309, 102 N. W. 694; *Thompson* v. *Brennan*, 104 Wis. 564, 80 N. W. 947; *Fitzsimons* v. *Richardson*, 86 Vt. 229, 84 Atl. 811; *King* v. *Cox*, 126 Tenn. 553, 151 S. W. 58.

In the absence of any statutory authority, we submit that the wife, having been deserted by her husband with a number of minor children, and with nothing to support them, and left at the plaintiff's home, with no one else in charge of his property, and such are the facts if her testimony is to be believed, she had authority by virtue of those circumstances, coupled with her relationship, to take the necessary steps to protect and manage the property of herself and husband. The authority of the wife to manage or dispose of the husband's property, under similar circumstances, has been considered in a number of cases. 21 Cyc. says, on page 1235, that the law will imply that a wife is acting as her husband's agent when she is left in charge of his property during his absence, or when he absconds intending not to return. The following cases support the same proposition: *People* v. *Horton*, 4 Mich. 67; *Butts* v. *Newton*, 29 Wis. 632; *Martin* v. *Oakes*, 42 Misc. Rep. 201, 85 N. Y. Supp. 387; *Felker* v. *Emmerson*, 16 Vt. 653, 42 Am. Dec. 532; *Casteel* v. *Casteel*, 8 Blackf. (Ind.) 240, 44 Am. Dec. 763. The same principle is recognized by *dictum* in the case of *Walker* v. *Simpson*, 7 Watts & S. (Pa.) 83, 42 Am. Dec. 217. (See also a discussion of the matter, R. C. L., "Husband and Wife," par. 212, and following.) Mr. Mechem, in volume 1 of his recent treatise on Agency, in paragraph 167, recognizes this principle, citing a number of cases in support thereof, and particularly *Buford* v. *Speed*, 74 Ky. (11 Bush)

338, holding the husband liable for legal services contracted for by her to protect his property during his absence. (*Hughes* v. *Mulvey*, 1 Sandf. (N. Y.) 92.)

MR. COMMISSIONER JACKSON prepared the opinion for the court.

In this case the defendant, an attorney at law, is sued by the plaintiff to recover judgment for the sum of $1,808.89, with interest from February 15, 1917. The plaintiff alleges that on February 23, 1916, an action was commenced in the district court of the fourth district of Montana, wherein John Buckhouse *et al.* were plaintiffs and Donald Buckhouse *et al.* were defendants, for the purpose of partitioning the estate of Henry Buckhouse, deceased, and dividing the proceeds thereof among the heirs, one of whom was the plaintiff in this action. No summons or complaint was served on the plaintiff, and he was out of the state between November 26, 1915, and May 29, 1917; that the defendant, without authority, appeared in the partition suit for the plaintiff, and after the right of plaintiff in this action was determined, and he was decreed the sum of $1,808.89, the defendant, without plaintiff's authority, received the said money and turned it over to one Fleety Buckhouse, about February 15, 1917, and that she was not entitled to any part of the same; that plaintiff had no knowledge of this proceeding until about March 17, 1917, and shortly thereafter demanded of defendant the payment of the money, which was refused. By answer, the defendant admits he appeared for plaintiff, but alleges that his appearance and all of his acts in connection therewith were lawful and with plaintiff's authority and consent; admits plaintiff's interest was determined in the partition suit, and alleges that the portion of the estate allotted to the plaintiff and his wife, Fleety Buckhouse, was the sum of $2,177.77; that a portion was paid out of this sum to the Missoula Mercantile Company, leaving a net sum of $1,808.89, which defendant admits he received as attorney for plaintiff and his wife, and turned over to

her, less $221.49, his fees for services in the partition suit, and in a divorce action wherein Fleety Buckhouse was plaintiff and the plaintiff herein was defendant, and which was pending at that time; admits the demand by plaintiff for the money and his own refusal. Defendant then alleges: That on February 25, 1916, Fleety Buckhouse had him file proceedings against plaintiff for divorce and custody of their four children. That service was had by publication in March, 1916, and a divorce granted February 17, 1917, awarding Fleety Buckhouse the custody of the children. That after the action for divorce had been filed, service of summons in the partition suit was had on Fleety Buckhouse. That on or about March 18, 1916, she employed defendant to represent the interests of herself and her husband in the said suit. That she represented to have, and in fact did have, authority from her husband to employ counsel on his behalf, and was empowered to deal in such manner as she deemed fit and proper with all of his property, in accordance with exhibits "A" and "B," as follows: "Exhibit 'A.' Missoula, Mont., Nov. 26, 1915. I hereby give Fleety Buckhouse authority to sign my name to any leases or to do as she sees fit with any real estate which I possess. [Signed] Donald Buckhouse."

"Exhibit 'B.' Missoula, Mont., Nov. 26, 1915. To Whom It may Concern: I have sold and delivered to Fleety Buckhouse all my personal property except one threshing machine for the sum of ($1.00) one dollar value received. [Signed] Donald Buckhouse." That under the authority vested in her, he turned over the money, and that no proceedings were had to determine the interests of plaintiff and Fleety Buckhouse in the fund, and that nothing is due plaintiff from defendant. That plaintiff had, at the time the divorce action was instituted, deserted Fleety Buckhouse and their children, and failed and refused to contribute to their support, and for more than two years before she received the money turned over to her by defendant she had no means whatever for providing herself with the necessaries of life, and that the sum

so received of $1,587.40 was reasonably necessary for providing the necessaries of life for her and her children, and that the sum of $221.49 was reasonable for defendant's services in the partition and divorce actions. That plaintiff was legally obliged to support his wife and children and that he should be estopped from denying the authority of the defendant to pay over the said money. Issue was joined by the reply. The trial was had to a jury and at the conclusion of all the testimony plaintiff and defendant each moved the court for a directed verdict. The motion of the plaintiff was granted and a verdict returned for him in the sum of $1,808.89. Motion by defendant for a new trial was granted, and from that order plaintiff appeals. The sole assignment of error is the granting by the court of the motion for a new trial.

A motion for a new trial lies in cases where it appears from [1] the record that there is an issue of fact wrongfully or erroneously determined after trial and decision by a jury, a court, or by referees. (Sec. 6793, Rev. Codes.) It is immaterial, as far as the motion is concerned, as to how the verdict was reached, whether by the jury or direction of court. If the record shows it comes within the purview of section 6794, the motion is proper, and the trial court may grant a new trial.

Plaintiff contends quite vigorously that a motion for a new [2] trial cannot lie when both parties move for a directed verdict, and that defendant's only remedy is by appeal from the judgment. He urges that, since each has moved for the directed verdict, they thereby concede in effect that it is a submission of an agreed statement of facts to the court. That this is the law, as far as the purpose of the motion is concerned, there is no doubt, but no authority can hold that the mere *ex parte* motion of either or both is binding on the record or the court's action. Such a motion merely states to the court that, in the opinion of the movant, from all of the testimony in the case, giving to the adverse party the

extreme benefit of his proof, there is but one legal conclusion to be drawn therefrom. And while the court may grant the motion and direct the verdict, it would be a far-fetched course of reasoning that would prevent a re-examination of the facts upon which the judgment of the court was based, when, upon a motion for a new trial, the court is convinced it had made an error in drawing its conclusion, to which proper exception had been taken, and where under a re-examination the correct determination would be had. If the directed verdict had been erroneously granted, it is an error in law during the trial, and one of our statutory grounds for a new trial.

The motion for a new trial was made on the ground of insuffi-
[3] ciency of the evidence to justify the verdict, which moves the discretionary power of the court, and also error in law occurring at the trial and excepted to by the defendant, which, standing alone, presents a question of strict legal right. In either assignment, if borne out by the record, the granting of the motion is not error. (*McIntyre* v. *Northern Pac. Ry. Co.*, 56 Mont. 43, 180 Pac. 971; *Jones* v. *Shannon*, 55 Mont. 225, 175 Pac. 882; *State* v. *Schnepel*, 23 Mont. 529, 59 Pac. 927; Hayne on New Trial and Appeal, sec. 100.)

In the long line of authorities cited by both parties, the ultimate result determined was whether or not the record of the case justified the action of the court in its rulings. (*Clement* v. *Rowe*, 33 S. D. 499, 146 N. W. 700; *Fifty Associates Co. of Great Falls* v. *Quigley*, 56 Mont. 348, 185 Pac. 155; *De Burg* v. *Armenta*, 22 N. M. 443, 164 Pac. 838; *Beuttell* v. *Magone*, 157 U. S. 154, 39 L. Ed. 654, 15 Sup. Ct. Rep. 566; *Empire State Cattle Co.* v. *Atchison Ry. Co.*, 210 U. S. 2, 15 Ann. Cas. 70, 52 L. Ed. 931, 28 Sup. Ct. Rep. 607.) Consequently, we are brought to the merits of the instant case to determine whether or not the granting of plaintiff's motion for a new trial was well taken.

This action was brought against the defendant and Fleety
[4] Smith, formerly Fleety Buckhouse, and dismissed before

trial as to the latter. Plaintiff proved a *prima facie* case in showing that the defendant appeared in the partition suit without his authority, collected the money, refused to pay it to plaintiff, and plaintiff did not authorize him to turn it over to anyone else. The defendant's chief, and in our opinion only, defense was based on the provisions of section 6480, Revised Codes: "If a husband and wife be sued together the wife may defend for her own right, and if the husband neglect to defend, she may defend for his right also." He proved that Donald Buckhouse deserted his wife, Fleety Buckhouse, and their four children of tender years, in the latter part of November, 1915, with the evident intention of abandoning them; that Fleety Buckhouse knew nothing of his whereabouts, although she had tried to locate him; that she requested the defendant to appear in the partition suit on her behalf, and likewise to defend for her then husband. Since the defendant's evidence so appears, we are compelled to the conclusion that the plaintiff was certainly guilty of negligence with respect to any property right he may have had at that time, and Fleety Buckhouse, who was still his wife, in spite of the fact that she had brought suit against him for divorce, had not only the right, but the duty, to defend for him and for herself in the partition suit, both being parties defendant. The only possible construction that can be placed on section 6480, Revised Codes, is that the wife represents her husband when he neglects to defend, and that she is clothed with authority, as his agent, for the purpose of the defense.

"It is a familiar principle of the law of agency that every authority given to an agent, whether general or special, express or implied, impliedly includes in it, and confers on such agent all the powers which are necessary, or proper, or usual, to effectuate the purposes for which such authority was created. It embraces appropriate means to accomplish the desired end." (*Benjamin* v. *Benjamin*, 15 Conn. 347, 39 Am. Dec. 384, quoting Justice Storrs.)

Our statute would indeed be emasculated and nugatory if [5] the wife had not the power to employ counsel and bind the negligent husband by the contract of employment. There seem to be no cases directly in point, construing section 6480, but the trend of judicial viewpoint may be gathered from *Butts* v. *Newton*, 29 Wis. 639, and *Savage* v. *Davis*, 18 Wis. 608. Having this power conferred on her by the law, in what position is the defendant? We pass over the ethics of his appearance for Fleety Buckhouse in the divorce action, and at the same time his representing both her and plaintiff in the partition suit, because under our construction of the statute, she had a right to hire defendant, and, as far as the partition suit was concerned, the interests of both Donald and Fleety Buckhouse were not antagonistic.

The defendant was the lawful employee of his clients, and in turning over to Fleety Buckhouse the amount decreed to be the share of Donald and Fleety Buckhouse in the estate of Henry Buckhouse, deceased, he acted lawfully. We have no concern as to the duty of Fleety Buckhouse with respect to this fund.

For the reasons herein set forth, we recommend that the order of the lower court in granting the motion for a new trial be affirmed.

PER CURIAM: For the reasons given in the foregoing opinion, it is ordered that the order of the lower court granting the motion for a new trial be affirmed.

Affirmed.

PRICE, RESPONDENT, v. NORTHERN PACIFIC RY. CO., APPELLANT.

(No. 4,389.)

(Submitted April 22, 1921. Decided May 23, 1921.)

[198 Pac. 439.]

New Trial—On Minutes—Presumptions—Grounds—Notice of Intention Controlling—Hearing—Delay—Duty of Parties.

New Trial—On Minutes of Court—Presumptions.

1. Where the notice of intention to move for a new trial was based upon the minutes of the court and a bill of exceptions thereafter to be settled, and the record on appeal from the order granting a new trial was silent as to the existence of a bill of exceptions, the supreme court will presume that the order was made upon the minutes, the burden of showing that it was not so made having been upon respondent.

Same—Grounds—Notice of Intention Controlling.

2. Since the party moving for a new trial may be heard only upon the grounds urged in his notice of intention, where movant in his notice to the adverse party stated that he would call his motion for hearing on a certain day and that the motion would be made pursuant to the notice of intention "and upon the records and files in said action," he neither added to nor detracted from the grounds of the motion itself by the words quoted.

Same—Diligence in Bringing Motion to Hearing—Discretion.

3. The question whether diligence was or was not shown in presenting a new trial motion for hearing is addressed to the discretionary power of the trial court, reviewable only in case of abuse of its discretion.

Same—Hearing—Diligence—Presumptions.

4. In the absence of an affirmative showing that the trial court abused its discretion in hearing a motion for new trial eleven months after notice of the motion, it will be presumed on appeal that it was heard at the earliest practicable period after notice, as required by section 6797, Revised Codes, where the motion was based upon the minutes of the court.

Same—Hearing—Diligence—Duty of Parties.

5. While primarily the duty of calling a motion for new trial for hearing at the earliest practicable period after notice of motion devolves upon movant, the adverse party may do so if he feels aggrieved by delay, and where he does not, he is not in position to complain.

Appeal from District Court, Broadwater County; John A. Matthews, Judge.

[60 Mont. 166.]

ACTION by R. C. Price against the Northern Pacific Railway Company. Judgment for defendant. From an order granting a new trial, defendant appeals. Affirmed.

Messrs. Gunn, Rasch & Hall, for Appellant, submitted a brief; *Mr. M. S. Gunn* argued the cause orally.

Plaintiff's notice, served on defendant almost a year after the verdict was rendered and the notice of intention to move for a new trial was made, states that it will be heard upon the records and files in said action. No bill of exceptions had been settled and filed, so as to become a record in said action, and just what documents could be considered by the court under the term "records and files in said action" is not defined by any statute or decision in this state. "Records and files" is not as comprehensive a term as "minutes of the court," which latter term includes "pleadings, records, minute entries, and the evidence offered at the trial." (*State ex rel. Cohen* v. *District Court,* 38 Mont. 119, 99 Pac. 139.)

Section 6797 of the Revised Codes makes a clear distinction between "records and files" and "proceedings on the trial," which latter term includes the stenographer's untranscribed notes of the testimony. The last sentence of this section reads: "On such hearing reference may be had in all cases to the pleadings and orders of the court, and when the motion is made on the minutes, reference may be also had to any depositions and documentary evidence offered at the trial, and to the proceedings on the trial."

We submit that a notice, stating that a motion for a new trial will be called up on a certain date, and will be heard on the records and files in the action, does not give the court authority to refer to or consider the "proceedings at the trial," which had never been filed and made a part of the record in such action. In *Moore* v. *Butte Electric Ry. Co.,* 47 Mont. 214, 131 Pac. 635, it was held that "minutes of the cause" was equivalent to "minutes of the court," but "records and

files'' cannot be the equivalent of the technical and well-defined term ''minutes of the court.'' Of course, if the motion was to be heard only on the records and files, the court had no authority to consider the sufficiency of the evidence and erred in granting the new trial on such ground.

If it is held that plaintiff's notice of October 10, 1918, was sufficient in form to authorize the court to consider everything embraced within the term ''minutes of the court,'' we insist that the court erred in not sustaining defendant's objection to the consideration at all of plaintiff's motion for a new trial on the minutes of the court, for the reason that said motion was not called up for hearing until the third, or possibly the fourth, term of court after the trial of the action and the notice of intention to move for a new trial was filed. Under such circumstances was plaintiff's application for a new trial ''heard at the earliest practicable period after notice of the motion,'' as required by section 6797? If the plain language of this section is to be given any force and effect, then, certainly, a motion not called up for hearing until three or four terms after the trial is a violation of such statute, and the motion should not be heard by the court, when objected to by the opposing party. (*State ex rel. Cohen* v. *District Court, supra; Malcolmsen* v. *Haines,* 90 Cal. 262, 27 Pac. 206; *O'Connor* v. *Healey,* 96 Misc. Rep. 278, 161 N. Y. Supp. 582.)

It is true that section 6797 provides that motions for a new trial ''may be brought to a hearing upon motion of either party.'' As to whether this provision relates to motions to be heard upon the minutes of the court, or only to motions ''in other cases after the affidavits or bills of exceptions, as the case may be, are filed,'' has never been determined, so far as we are advised. However, we submit that it is the duty of the moving party to call up his motion for hearing, especially in a case where the notice of intention states that the motion will be made upon the minutes of the court. (*Galbraith* v. *Lowe,* 142 Cal. 295, 75 Pac. 831; *Dorcy* v. *Brodis,* 153

Cal. 673, 96 Pac. 278; *Doon* v. *Tesh*, 131 Cal. 406, 63 Pac. 764.) Assuming, however, that either party had the right to call up for hearing the motion for a new trial on the minutes of the court, we submit that if he failed to do so until the third or fourth term of court after the motion was made, and that thereupon the other party objected to the hearing of the motion at that time, under the mandatory provisions of section 6797 it was the duty of the court to refuse to consider the motion. Especially so, in the absence of any showing that it was not practicable to have the hearing of the motion at an earlier period.

Messrs. Galen, Mettler & Toomey, for Respondent, submitted a brief; *Mr. Frank W. Mettler* argued the cause orally.

MR. COMMISSIONER SPENCER prepared the opinion for the court.

This is an action for damages to plaintiff's land and certain personal property, caused, as charged by the plaintiff, by negligence of the defendant in constructing and maintaining an obstruction which diverted the flood waters of the Missouri River upon the plaintiff's land. Issue was joined and trial had to a jury, which returned its verdict in favor of defendant. Judgment upon the verdict was made and entered November 30, 1917. On December 8, 1917, plaintiff served and filed his notice of intention to move for a new trial upon the grounds of (1) the insufficiency of the evidence to justify the verdict and (2) errors in law occurring at the trial and excepted to by the plaintiff, and based his motion "on the minutes of the court and upon a bill of exceptions hereafter to be settled." On October 11, 1918, plaintiff served notice upon the defendant that on November 11, 1918, he would call for hearing his motion for new trial, and among other things the notice contained the following: "The said motion will be made pursuant to the notice of intention to move for a new trial heretofore filed in the above-entitled action, and will be

heard upon the records and files in said action"; and on November 11, the motion for new trial was submitted to the court upon brief of plaintiff and written communication from defendant to the court objecting to the hearing of said motion as being in violation of section 6797 of the Revised Codes. On November 27, the court made its order vacating the verdict and judgment based thereon and granting a new trial. Appeal is from said order.

Appellant concedes that if the motion for a new trial based upon the minutes of the court could be heard at all, under the conditions as shown by the record, this court will not interfere with the order of the court below, so that but two questions are before us for determination, *viz.*: Could the motion be heard upon the minutes of the court at all, in view of the record before us? and was such hearing in violation of the provisions of section 6797, Revised Codes?

The notice served on defendant, advising it of the day upon [1, 2] which the motion for a new trial would be called for hearing, has served its purpose when the adverse party is told a reasonable length of time in advance that the motion would be called to the attention of the court, so that he may present any defense he may have to the motion. No particular form of notice is required. In this case thirty days' notice was given, and defendant was advised that the motion would be heard pursuant to the notice of intention, and "upon the records and files in said action." The last phrase was purely gratuitous upon the part of the movant, and neither added to nor detracted from the grounds of the motion itself. The respondent was not bound by any statement in his notice, as the motion, in any event, could only be heard upon the grounds and pursuant to the notice of intention. The notice of intention was based upon the minutes of the court, as well as a bill of exceptions, thereafter to be settled. The motion having been granted, and the record before us being silent as to the existence of a bill of exceptions, we indulge the presumption that the order was made upon the minutes of the court, and

the burden was upon the appellant to show that it was not so made. (*Moore* v. *Butte Elec. Ry. Co.*, 47 Mont. 214, 131 Pac. 635.)

Was the court justified in hearing the motion notwithstanding the provisions of section 6797, Revised Codes? This section provides: "The application for a new trial must be heard at the earliest practicable period after notice of the motion, if the motion is to be heard upon the minutes of the court." The record does not disclose any cause or excuse for delay in hear-
[3, 4] ing the motion. The determination of the question of diligence in presenting the motion for hearing was within the discretionary power of the trial court. (*Galbraith* v. *Lowe*, 142 Cal. 295, 75 Pac. 831; *Dorcy* v. *Brodis*, 153 Cal. 673, 96 Pac. 278.) Delay such as appears here should not be countenanced by the court unless for good cause shown, and much of the criticism heaped upon the courts of to-day is due to such cause. However, we presume, in the absence of affirmative showing to the contrary, that the trial court heard the motion in the ordinary exercise of its judicial duties, at the earliest practicable period after notice of motion (*State ex rel. Beach* v. *District Court*, 29 Mont. 265, 74 Pac. 498), and unless there is clear abuse of discretion, this court will not interfere (*Brange* v. *Bowen*, 57 Mont. 77, 186 Pac. 680; *Jones* v. *Shannon*, 55 Mont. 225, 175 Pac. 882; *Robinson* v. *Cole*, 46 Mont. 140, 126 Pac. 850; *Mullen* v. *City of Butte*, 37 Mont. 183, 95 Pac. 597; *Ettien* v. *Drum*, 32 Mont. 311, 80 Pac. 369; *Hendrickson* v. *Wallace*, 29 Mont. 504, 75 Pac. 355).

Either party could have called this motion for hearing, and
[5] while primarily this duty devolved upon the movant, yet if the defendant felt aggrieved by the delay it could have exercised its privilege, and by not doing so it must share the fault. We cannot say the court abused its discretion.

We find no error in the ruling of the court, and therefore recommend that the order of the court vacating the verdict and judgment and granting a new trial be affirmed.

PER CURIAM: For the reasons given in the foregoing opinion, it is ordered that the order of the court vacating the verdict and judgment and granting a new trial be affirmed.

Affirmed.

MR. JUSTICE GALEN, being disqualified, takes no part in the above order.

WHITELAW, RESPONDENT, *v.* VALLANCE ET AL., APPELLANTS.

(No. 4,374.)

(Submitted April 20, 1921. Decided May 23, 1921.)

[198 Pac. 449.]

Contracts — Breach — Special Damages — Complaint — Insufficiency.

Contracts—Breach—Nominal Damages Recoverable, When.

1. A violation of a valid contract, unless excusable or justifiable, is an invasion of the injured party's legal rights for which he may recover nominal damages without proof of actual damages.

Same—Loss of Business and Profits—Special Damages—Complaint.

2. Damages for loss of business and profits resulting from a breach of contract are special in character, in the sense that, while flowing from the action of the defendant, they are not such a necessary result thereof as that they will be implied by law, and must be pleaded.

Same—Complaint—Nominal Damages.

3. Under a complaint alleging that plaintiff had purchased potatoes from defendants at a stated price and offered to receive and pay for them on a certain date, but that defendants failed to make delivery, plaintiff was entitled to no more than nominal damages.

Same—Special Damages—Evidence—Erroneous Admission.

4. Admission of evidence showing special damages under a complaint alleging general damages only was error.

Same—Time of Performance—Complaint—Insufficiency.

5. Where the contract of purchase of potatoes for the breach of which damages were sought was silent as to the time of their delivery, and the complaint did not allege any date or that delivery should be made within a reasonable time, the pleading was insufficient.

---

2. Loss of profits as measure of damages in breach of contract of sale, see notes in 42 **Am. Rep.** 461; 60 **Am. Rep.** 488.

[60 Mont. 172.]

Appeals from District Court, Ravalli County; R. Lee McCulloch, Judge.

ACTION by Paul Whitelaw against John B. Vallance and another. From a judgment for plaintiff and from the order denying defendants' motion for new trial, defendants appeal. Reversed and remanded.

Mr. E. C. Kurtz, Mr. H. C. Packer and *Mr. George T. Baggs,* for Appellants, submitted a brief; *Mr. Packer* and *Mr. Baggs* argued the cause orally.

The complaint fails to state the time of performance, or that the alleged contract was to have been performed within a reasonable time or upon request, and that such reasonable time had elapsed or such request had been made. The omission of all these material and essential allegations was fatal and the demurrers should have been sustained. (9 Cyc. 725; *Ryberg* v. *Goodnow,* 59 Minn. 413, 61 N. W. 455.)

The complaint fails to allege that plaintiff, by reason of defendant's failure to deliver the potatoes, was compelled to purchase elsewhere and at a higher price. It contains the bare conclusion that by reason of such failure to deliver plaintiff lost profits and suffered damages in the sum of $700. This is not sufficient. (13 Cyc. 173–176; Sutherland on Code Pleading, sec. 4644; 35 Cyc. 623, 633, 644; *Brophy* v. *Idaho Produce & Provision Co.,* 31 Mont. 279, 78 Pac. 493; *Halstead Lumber Co.* v. *Sutton,* 44 Kan. 192, 26 Pac. 444; *Cutting Fruit Packing Co.* v. *Canty,* 141 Cal. 692, 75 Pac. 564.)

Messrs. O'Hara & Madeen, for Respondent, submitted a brief; *Mr. Robert A. O'Hara* argued the cause orally.

The plaintiff was a commission merchant engaged in buying and selling potatoes, and in such cases, without any allegations of resale to any particular person, losses of profits are not special damages, but general damages and may be recovered under a general allegation of damage.

[60 Mont. 172.]

From sections 6055 and 6082, Revised Codes, it will be seen that the elements necessary were the contract for the sale, failure to deliver, and proof of value of the property at the time of, or within a reasonable time after, the failure to deliver. These are covered by the general allegations of damages, and the proof tendered in this case. (*Carlson* v. *Stone-Ordean-Wells Co.*, 40 Mont. 434, 107 Pac. 419.) The allegations of the complaint in the instant case are almost identical with those in the case of *Bussard & Robson* v. *Hibler*, 42 Or. 500, 71 Pac. 642, which was a case where the plaintiff had purchased defendant's wool at a fixed price, and the defendant failed to deliver, and the market price was in excess of the contract price at the time of delivery, and the court said: "The damages sought to be recovered in the case at bar are such as would inevitably follow from the breach of the agreement, and being general, no necessity existed for alleging any special damages, such as that the purchases were made for resale. * * * In any event, they do not seek to recover such damages as would ensue if they had a contract for a resale of the commodity to a particular person." (*Johnson* v. *Gilmore*, 6 S. D. 276, 60 N. W. 1070; *Brazell* v. *Cohn*, 32 Mont. 556, 81 Pac. 339.)

MR. CHIEF COMMISSIONER POORMAN prepared the opinion for the court.

Appeal by defendant from a judgment in favor of plaintiff entered on a directed verdict, and from the defendants' motion for a new trial.

The plaintiff alleges that "on or about the 14th of October, 1916, the plaintiff and defendants mutually agreed that the defendants should deliver to the plaintiff two carloads of potatoes, about 800 sacks and 100,000 pounds, same to be free from frost, and that the plaintiff should pay therefor on delivery the sum of $1.30 per hundredweight"; that on or about the 1st of November, 1916, plaintiff offered to receive and pay for the potatoes and fully perform the condi-

tions of said contract on his part to be kept and performed, and that the defendants failed at all times and neglected and refused to deliver the potatoes, or any part thereof, and that the plaintiff has been damaged in the sum of $700 by reason of such failure on the part of the defendants. Judgment is asked for $700. Defendants filed separate demurrers on the ground that the complaint does not state facts sufficient to constitute a cause of action. These demurrers were overruled, and defendants filed separate answers, which amount in effect to general denials. At the trial, defendants objected to the introduction of any evidence for the reason that the complaint fails to state a cause of action, *etc.* At the close of plaintiff's case, and after plaintiff had rested, the defendants moved "for an order and judgment of nonsuit" for several reasons, which may be generalized in the one statement of insufficiency of evidence to sustain a verdict or judgment for plaintiff. These motions were overruled by the court, and the plaintiff then asked that the jury be instructed to return a verdict for the plaintiff for the sum of $700. This motion was granted, and a verdict returned for the plaintiff and against both the defendants for the sum of $700.

The issue taken with the complaint by the demurrers and by the objections to the introduction of evidence is to the effect that the damages, if any, are special, and that evidence of special damages could not properly be admitted under the complaint; that no time was named or otherwise fixed for the delivery of the potatoes, and that any damages awarded would be conjectural and speculative.

[1, 2] 1. It is settled law that a violation of a valid contract, unless excusable or justifiable under the circumstances, is an invasion of the injured party's legal rights for which he may recover nominal damages without proof of the actual damages. (*O'Brien* v. *Quinn*, 35 Mont. 441, 90 Pac. 166; 13 Cyc. 14.) The rule stated in the *O'Brien Case* is: "Damages for loss of business and profits could only properly come under

the designation 'special damages.' General damages are defined to be such as the law implies and presumes to have occurred from the wrong complained of (13 Cyc. 15), or such damages as the law holds to be the necessary result of the action of the defendant (5 Ency. of Pl. & Pr. 717); while special damages are such as actually result from the action of the defendant, but are not such a necessary result that they will be implied by law. (*Root* v. *Butte, Anaconda & Pac. Ry. Co.*, 20 Mont. 354, 51 Pac. 155; 13 Cyc. 13.)

This complaint is to the effect that on October 14, 1916, **[3]** plaintiff purchased some potatoes of defendants at $1.30 per hundredweight, and on November 1, 1916, plaintiff offered to receive and pay for the potatoes, and that defendants failed at all times to make delivery. From this meager statement, we are unable to understand, as a matter of law, how any damage can be implied or presumed from the wrong complained of, beyond the nominal. The damages complained of might be treated as general damages under appropriate pleadings.

In his brief, respondent says: "We have already shown that plaintiff was a commission merchant engaged in buying and selling potatoes," but this fact appears for the first time in the evidence. The complaint is silent respecting any such mat- **[4]** ter. The complaint, as it appears, does not do more than to allege general damages, while evidence was erroneously admitted for the purpose of proving special damages. We may say that sections 6056, 6082, Revised Codes, prescribe rules for the measurement of damages, and not for the construction of pleadings. Respondent cites *Carlson* v. *Stone-Ordean-Wells Co.*, 40 Mont. 434, 107 Pac. 419; *Brazell* v. *Cohn*, 32 Mont. 556, 81 Pac. 339; *Bussard & Robson* v. *Hibler*, 42 Or. 500, 71 Pac. 642; *Johnson* v. *Gilmore*, 6 S. D. 276, 60 N. W. 1070. We do not think these cases sustain respondent's contention. The complaints therein contained some statements which brought the damages claimed within the rule of general damages.

The contract, as alleged in the complaint, is wholly silent [5] as to the time of its performance, and no allegation appears naming any time, and no statement from which any particular time may be inferred, except the statement that the plaintiff offered to receive the potatoes on the 1st of November, 1916. The other party to the contract may have decided upon a different date for performance. If a reasonable time is to be the guide, it should be alleged. In *Borough etc.* v. *Atlantic Coast Elec. Co.*, 68 N. J. L. 73, 52 Atl. 231, the court said: "The plaintiff having demurred, we have examined the pleadings sufficiently to see that the *narr.* itself is bad, in that the time of the material traversable facts is not stated, *viz.*, the time at which the defendant ought to have performed, and the time at which it failed to perform, and the time at which the plaintiff's right of action arose. These allegations are not only required by the rules of correct pleading, but, in a case into which reasonable time enters, they are of the essence of the declaration, not that the plaintiff must prove the actual time sued or fail, but that it may appear what relation time bore to the alleged breach of duty, and that, at least by the plaintiff's own showing, the cause of action had accrued before the commencement of the suit. (Chit. Pl., p. 251; Gould, Pl., sec. 63.") The same rule is announced by the following authorities: 9 Cyc. 725; 13 C. J. 729; *Pope* v. *Terre Haute Car & Mfg. Co.*, 107 N. Y. 61, 13 N. E. 592; *Armstrong* v. *Reide*, 47 Misc. Rep. 609, 94 N. Y. Supp. 434.

Objection is also made to the admission of certain evidence. These questions may not arise on a retrial of this cause. We will say, however, that the facts as presented in this record are not sufficient to justify the admission in evidence of plaintiff's exhibits as against the defendant John B. Vallance, but that the said exhibits were properly admitted in evidence as against the defendant Fred Vallance. That the court erred in directing a verdict for the plaintiff is apparent from the foregoing discussion.

We believe that the judgment and order appealed from should be reversed and the cause remanded for a new trial, and we so recommend.

PER CURIAM: For the reasons given in the foregoing opinion, it is ordered that the judgment and order appealed from be reversed and the cause remanded for a new trial.

Reversed and remanded.

STATE EX REL. HOGUE, RESPONDENT, v. O'BRIEN, APPELLANT.

(No. 4,612.)

(Submitted May 20, 1921. Decided May 23, 1921.)

[198 Pac. 1117.]

Intoxicating Liquors—Search-warrants—Improper Issuance.

1. Search-warrant *held* improperly issued, under decision in the case of *State ex rel. Samlin* v. *District Court*, 59 Mont. 600.

Appeal from District Court, Ravalli County; R. Lee McCulloch, Judge.

SEARCH-WARRANT proceeding by the State of Montana, on the relation of C. E. Hogue, Sheriff, against W. P. O'Brien and certain intoxicating liquors. From a judgment declaring forfeited a quantity of whisky, and ordering it destroyed, defendant appeals. Reversed.

Cause submitted on briefs of Counsel for Appellant.

Mr. R. A. O'Hara, Mr. Geo. T. Baggs and *Mr. E. C. Kurtz*, for Appellant.

Opinion—PER CURIAM.

This is a search-warrant proceeding instituted in the district [1] court of Ravalli county by C. E. Hogue, as sheriff, under

the provisions of the Prohibition Enforcement Act. It comes before this court on appeal by the defendant from a final judgment rendered by the court, after a hearing upon the return by the sheriff of the warrant, declaring forfeited a quantity of whisky seized thereunder and ordering it destroyed. Though this case was brought here on appeal from the final judgment, and the case of *State of Montana ex rel. John Samlin* v. *District Court of Custer County*, 59 Mont. 600, 198 Pac. 362, was an original application for a writ of prohibition, the ultimate question submitted for decision in this case is the same as that decided in the latter case. Upon the authority of that case, the judgment is reversed, and the district court is directed to dismiss the proceeding and order the sheriff to return the whisky seized by him to the defendant.

Reversed.

BATCHOFF, ADMR., RESPONDENT, *v.* BUTTE PACIFIC COPPER CO. ET AL., APPELLANTS.

(No. 4,234.)

(Submitted January 5, 1921. Decided January 20, 1921.)

[198 Pac. 132.]

Personal Injuries—Death—Master and Servant—Executors and Administrators—Complaint—Misjoinder of Parties—Default Judgments—Notice—Service by Mail—Demurrer—Extension of Time for Answer—Statute—Judicial Notice—Record on Appeal from Judgment—Bills of Exception.

Personal Injuries—Death—Master and Servant—Action by Administrator—Complaint—Sufficiency—Misjoinder of Parties.

1. The right of action for damages given by section 6486, Revised Codes, to the heirs or personal representative of an adult whose death is caused by wrongful act or negligence is solely for the benefit of the heirs, the representative merely acting as their trustee and the amount recovered not being a part of decedent's estate; hence the complaint of an administrator setting forth the damages sustained by decedent's father and mother was not open to demurrer on the ground of misjoinder of parties plaintiff (the administrator

and the heirs) or causes of action, recovery by the administrator barring a subsequent action by the heirs.

Same—Heirs—Complaint—Sufficiency—Inferences.

2. Since under section 4820, subdivision 2, Revised Codes, the father and mother of an intestate were his heirs at law, the allegation of plaintiff administrator that the adult for whose wrongful death damages were sought died intestate, leaving surviving him his father and mother, naming them, was sufficient to state by inference that they were his heirs, in the absence of a direct allegation to that effect.

Dismissal of Action—Default—Neglect to Demand Entry of Judgment.

3. The six months period at the expiration of which an action may be dismissed by the court, under section 6714, Revised Codes, if the party entitled to judgment neglects to demand and have the same entered, does not commence to run from date of entry of default, in a personal injury action, but from the date of final submission, *i. e.*, production of proof by plaintiff.

Overruling Demurrer—Service of Notice by Mail.

4. *Quaere:* Was service of notice of the overruling of a demurrer, time being given within which to answer, made by mailing a postal card, legal service?

Same—When Service of Notice by Mail Complete.

5. Service of notice by mail of overruling of demurrer was complete upon deposit thereof in the postoffice, even though the notice was never received by the party to whom it was addressed.

Same—Extension of Time for Answer—Distance Between Places of Deposit and Address—Judicial Notice.

6. In determining whether the time for answering, after demurrer overruled was extended one day for every twenty-five miles distance between the place of deposit of notice, served by mail, and place of address, courts may take judicial notice of the distance between the place where mailed and the place of address.

Same—Extension of Time for Answer—Applicability of Statute.

7. The provision of section 7148, Revised Codes, that in case of service by mail, where something is to be done by the adverse party within a given number of days after service, the time within which it may be done is extended one day for every twenty-five miles distance between the place of deposit and the place of address, applies in a case where, after overruling of a demurrer to a complaint defendant is granted a given number of days within which to serve and file answer, or is ordered to do so on or before a certain date, the two meaning substantially the same thing.

Default Judgment—Premature Entry—Error Within Jurisdiction.

8. Premature entry of default constitutes error within jurisdiction, the judgment following being voidable, not void.

Same—Refusal to Vacate—Appealable Order.

9. An order, made after judgment, denying a motion to set aside a default and judgment, is appealable under section 7098, Revised Codes; hence where no appeal was taken, the alleged error in refusing the motion was not reviewable on appeal from the judgment. (On rehearing.)

Appeal from Judgment—Record on Appeal—Bills of Exception.

10. *Held*, that the provision of section 7112, Revised Codes, requiring that the record on appeal from a final judgment shall contain the judgment and any bills of exception upon which appellant re-

[60 Mont. 179.]

lies, refers to only such bills of exceptions as are settled under sections 6787 and 6788 or are used on motion for new trial, and that therefore any bill not so settled or used cannot be considered on such appeal. (On rehearing.)

Appeal from District Court, Deer Lodge County; George B. Winston, Judge.

ACTION by D. A. Batchoff, as administrator of the estate of Dimitre Stoycoff Gancheff, deceased, against the Butte Pacific Copper Company and another. Judgment by default for plaintiff, and the defendants, after denial of motion to set aside the default and the judgment, appeal from the judgment. Affirmed.

Messrs. Galen, Mettler & Toomey, for Appellants, submitted a brief; *Mr. Frank W. Mettler* argued the cause orally.

Messrs. Maury & Wheeler, for Respondent, submitted a brief; *Mr. H. L. Maury* argued the cause orally.

MR. JUSTICE REYNOLDS delivered the opinion of the court.

This action was brought by D. A. Batchoff, as administrator of the estate of Dimitre Stoycoff Gancheff, deceased, to recover damages for the death of the deceased, alleged to have been caused by the defective condition of a certain mining shaft due to negligence of defendants.

To the amended complaint defendants filed demurrer, which demurrer was overruled on the second day of September, 1916. In the order overruling the demurrer, defendants were granted to and including the first day of October, 1916, within which to serve and file answer. Neither defendant, nor either of their attorneys, was present in court at the time of the entry of the order overruling the demurrer, nor was any notice served upon them, or either of them, by the attorneys for plaintiff. On the second day of September, 1916, the clerk mailed to attorneys for defendants a postal card advising them of the order and of the time within which they were required to an-

swer. The attorneys for defendants deny having received any such notice. On the third day of October, no answer having been filed, default was entered against defendants. On the eleventh day of May, 1917, judgment on default was entered in favor of plaintiff and against defendants. Thereafter defendants made motion to set aside default and the judgment, and tendered an answer setting forth a defense upon the merits. This motion was overruled. Appeal is taken to this court from the judgment.

The demurrer to the amended complaint was made on the [1] grounds that there was a misjoinder of parties plaintiff, for the reason that it was sought to join with D. A. Batchoff, as administrator of the estate of Dimitre Stoycoff Gancheff, deceased, the father and mother of said deceased; that the causes of action were improperly united in the complaint, in that the cause of action in favor of plaintiff, D. A. Batchoff, as administrator, was improperly united with the cause of action in favor of each the father and mother of the deceased; and that the amended complaint was ambiguous in that it could not be determined therefrom what damages were sought in behalf of the estate, what damages in behalf of the father of the deceased, and what damages in behalf of the mother of the deceased. The demurrer also rested upon the general ground that the amended complaint does not state facts sufficient to constitute a cause of action.

From an examination of the amended complaint, the court is satisfied that it does state facts sufficient to constitute a cause of action under section 6486, Revised Codes, which provides as follows: "When the death of one person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section such damages may be given as under all the circumstances of the case may be just."

It is urged by appellants that under said statute there exists an action in favor of the personal representative of an estate for damages for the death of a person not a minor, and also in favor of the heirs at law of the deceased, and that in the amended complaint in question, it is impossible to segregate the damages that are claimed by the administrator, from those that are claimed by the heirs at law of the deceased. It is also contended that even though the names of the father and mother do not appear in the title of the case, yet, inasmuch as the amended complaint seeks to recover damages suffered by them, they are substantially parties to the proceeding. Under the theory of appellants, as above mentioned, arises the alleged improper joinder of parties and improper joinder of causes of action.

Under the common law, any action for damages due to personal injuries would abate with the death of the party injured and no action at all could lie if the injury resulted in death. By reason of the apparent injustice of such a rule, statutes have been enacted whereby the cause of action survives the death of the party injured, and in case the injury produces death, then the cause of action survives to his personal representative or heirs at law. The right of action being statutory, it must be controlled and limited by the statute and its proper interpretation.

In the case of *Melville* v. *Butte-Balaklava Copper Co.*, 47 Mont. 1, 130 Pac. 441, is given a review of the history of legislation in this state whereby right of action is granted to the personal representative or heirs at law of the deceased for damages resulting in death. It appears that this statute was probably copied from the Code of Civil Procedure of California, as amended by the Act of March 24, 1874 (Cal. Code Civ. Proc., sec. 377). The supreme court of that state has had this statute under consideration in several cases and has uniformly held that the right of action is solely for the benefit of the heirs of the deceased; that the provision whereby action may be brought by the personal representative of the deceased

does not confer any right of action upon the estate of the deceased, but that the personal representative, in so bringing such an action, is acting merely as a trustee for the benefit of the heirs; that under either method of procedure, the action, in substance, is entirely for the benefit of the heirs; that the proceeds thereof cannot be considered any part of the estate of the deceased; and that, in fact, a proceeding cannot be sustained at all under this statute in case it does not affirmatively appear that the deceased died leaving heirs surviving him. Consistently with the principles above set forth, the same court holds that an action by the personal representative is a bar to any action by the heirs of deceased, and *vice versa.* (*Munro* v. *Pacific Const. etc. Co.*, 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303; *Webster* v. *Norwegian Milling Co.*, 137 Cal. 399, 92 Am. St. Rep. 181, 70 Pac. 276; *Salmon* v. *Rathjens*, 152 Cal. 290, 92 Pac. 733; *Jones* v. *Leonardt*, 10 Cal. App. 284, 101 Pac. 811; *Ruiz* v. *Santa Barbara Gas & Elec. Co.*, 164 Cal. 188, 128 Pac. 330; *Slaughter* v. *Goldberg, Bowen Co.*, 26 Cal. App. 318, 147 Pac. 90; *Hirsch* v. *James S. Remick Co.*, 38 Cal. App. 764, 177 Pac. 876; *Tann* v. *Western Pac. Ry. Co.*, 39 Cal. App. 377, 178 Pac. 971; *Hartigan* v. *Southern Pac. Ry. Co.*, 86 Cal. 142, 24 Pac. 851.)

In the case of *Ruiz* v. *Santa Barbara Gas & Electric Co.*, *supra*, the court expressed itself in these words: "It is settled by the decisions that an action of the character authorized by section 377 of the Code of Civil Procedure is one solely for the benefit of the heirs, by which they may be compensated for the pecuniary injury suffered by them by reason of the loss of their relative, that the money recovered in such an action does not belong to the estate but to the heirs only, and that an administrator has the right to bring the action only because the statute authorizes him to do so, and that he is simply made a statutory trustee to recover damages for the benefit of the heirs."

In the case of *Tann* v. *Western Pacific Ry. Co.*, *supra*, the court, in considering the sufficiency of a complaint based upon

said statute, used the following words: "Undoubtedly the complaint does fail to state a cause of action if it fails to allege that deceased was an adult and left an heir, or heirs, an allegation absolutely essential in an action of this character."

In *Hartigan* v. *Southern Pacific Ry. Co., supra,* the supreme court of California uses this language: "When the personal representative of the deceased brings an action to recover damages for the act or negligence causing death, if another action is afterward brought by the heirs of the deceased, the pendency of the prior action may be well pleaded in abatement of it; or if a judgment has been rendered in the first, such judgment may be well pleaded in bar of the second, action."

It will therefore be seen from the foregoing authorities that it is immaterial whether the action is brought by the personal representative or by the heirs of the deceased, for the action is substantially the same action and the damages recoverable are identical. Such being the case, there cannot be anything improper in setting out in the complaint in question the damages alleged to have been suffered by the father and mother of the deceased.

It is contended that the amended complaint fails to state [2] that the father and mother of the deceased were in any way interested in the cause of action, for it does not specifically allege that they were the heirs at law of deceased. The amended complaint alleges that "said Dimitre Stoycoff Gancheff died unmarried, intestate, leaving surviving him his father, by name Stoicko Gancheff, aged sixty-three years, and a mother, by name Penka Stoicko Gancheff, aged sixty years." It appearing from the foregoing that the deceased died unmarried and intestate, his father and mother would necessarily be his heirs at law under the statutes of succession. (Rev. Codes, sec. 4820, subd. 2.) As such is the necessary inference from the language used, it must be held that the amended complaint sufficiently states that fact.

It is contended by defendants that the judgment was entered [3] without jurisdiction, for the reason that it was not entered for more than six months after the entry of default. This contention is based upon Revised Codes, section 6714, subdivision 6, which reads as follows: "An action may be dismissed or a judgment of nonsuit entered in the following cases: * * * (6) By the court, when after verdict or final submission, the party entitled to judgment neglects to demand and have the same entered for more than six months."

It will be noted that the obligation to enter judgment within the period of six months above mentioned is six months after verdict or final submission. While default was entered on the third day of October, no verdict was ever rendered, as the case was not submitted to the jury; and the case was not finally submitted to the court until the eleventh day of May, 1917, the date of the entry of judgment. Proof being required in such cases as this, upon which to base the entry of the judgment, judgment could not have been entered upon the default. Since it was entered upon the same day that proof was submitted, the statutory restriction does not apply.

It is also contended that the judgment was entered without [4–6] jurisdiction, for the reason that the default was prematurely entered. The statute provides that when a demurrer to a complaint is overruled and time is given for answer, the time so given runs from service of notice of the order, except when the defendant is in court. (Rev. Codes, sec. 6594.) In this case neither defendant nor either of defendants' attorneys was in court at the time the order was entered; so the time for answer commenced to run from the time of service of notice of the order. Service of the notice was made by the clerk by mail, under the provisions of section 7148 of the Revised Codes, which statute is as follows: "In case of service by mail, the notice or other paper must be deposited in the postoffice, addressed to the person on whom it is to be served, at his office or place of residence, and postage paid. The service is complete at the time of the deposit, but if within a

given number of days after such service, a right may be exercised, or an act is to be done by the adverse party, the time within which such right may be exercised or act be done, is extended one day for every twenty-five miles distance between the place of deposit and the place of address. The service in any case is deemed complete at the end of forty days from the date of its deposit in the postoffice."

Conceding, for the purposes of this case, that service of notice could be made by the clerk by mailing a postal card (although it is doubtful whether or not such service could be deemed a legal service), service was complete at the time of the deposit of the notice in the postoffice, which in this case was the second day of September, 1916. Such service was complete upon deposit, even though the notice was never actually received by defendants' attorneys. (*Griffin* v. *Board of Commissioners of Walworth Co.*, 20 S. D. 142, 104 N. W. 1117.) The statute, however, provides that if, within a given number of days after such service a right may be exercised or an act is to be done by the adverse party, the time within which such right may be exercised or act be done is extended one day for every twenty-five miles distance between the place of deposit and the place of address. The question arises as to whether or not the time for answer was extended by this provision of the statute beyond the first day of October, 1916, inasmuch as the place of deposit of the notice was Anaconda, and the place of address, Helena. The distance between the two places is about ninety-seven miles, of which fact the court may take judicial notice.

The statute uses the expression "within a given number [7] of days after such service," and it is contended that, inasmuch as the order in this case did not specifically provide that answer should be made within a given number of days but on or before a definite date, such provision of the statute does not apply. It is the opinion of the court, however, that by the enactment of this provision of the statute it was the intention of the legislature to give to a party living at a distance

from the place of mailing additional time for performing the act to be done equivalent to one day for each twenty-five miles distance. It is substantially the same thing whether the order requires the act to be performed within a limited number of days, or on or before a definite date; and there can be no reason why, if the rule should be applied in one case, it should not be also applied in the other. The reasonableness of such a construction is apparent when it is considered that if the statute is not so construed, one may literally comply with the statute and absolutely prevent the other party from exercising his right, by giving a notice so late that the other party could not act upon it within the time required by such an interpretation. In this particular case, if notice had been deposited upon the thirtieth day of September, 1916, the notice would be complete upon that date and before the time required for answer, and yet it is evident that the defendants would not have been given any opportunity whatever to make such answer.

It is therefore the opinion of the court that under the provisions of this statute, the time of defendants for answer was extended to and included at least the fourth day of October, 1916. Under this construction of the statute, the default was prematurely entered, was without jurisdiction, and the judgment which followed was likewise without jurisdiction and void.

For the reasons above mentioned, the judgment is reversed, and the cause remanded, with directions to the lower court to set aside the default and permit the defendants to file their answer as of the time of its tender.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES COOPER and HOLLOWAY concur.

MR. JUSTICE GALEN, being disqualified, takes no part in the decision of this case.

ON REHEARING.

(Submitted April 22, 1921. Denied May 23, 1921.)

MR. JUSTICE REYNOLDS delivered the opinion of the court.

In the original opinion in this case it was stated [8] that "The default was prematurely entered, was without jurisdiction, and the judgment which followed was likewise without jurisdiction and void." While under the facts stated in the opinion it was error to prematurely enter the judgment, yet such entry was not without jurisdiction, but was error within jurisdiction. It was voidable but not void. (23 Cyc. 745; 12 Cyc. 755; 2 Freeman on Judgments, pars. 532, 542; *Cook* v. *Mix*, 10 Conn. 565; *Drew* v. *Claypool*, 61 Mich. 233, 28 N. W. 78; *Anheuser-Busch Brewing Assn.* v. *McGowan*, 49 La. Ann. 630, 21 South. 766; *Mitchell* v. *Aten*, 37 Kan. 33, 1 Am. St. Rep. 231, 14 Pac. 497; *People* v. *Dodge*, 104 Cal. 487, 38 Pac. 203; *O'Rear* v. *Lazarus*, 8 Colo. 608, 9 Pac. 621; *Remnant* v. *Hoffman* (Cal.), 11 Pac. 319; *Gwillim* v. *First Nat. Bank of Colorado Springs*, 13 Colo. 278, 22 Pac. 458; *Ross* v. *Wellman*, 102 Cal. 1, 36 Pac. 402; *Hole* v. *Page*, 20 Wash. 208, 54 Pac. 1123.)

On rehearing, the question considered is the right of this [9, 10] court to review, upon the record as submitted, the error of the court in prematurely entering judgment. There is nothing in the judgment-roll showing the premature entry of the judgment, but it is in all respects fair upon its face. After judgment was entered a motion, supported by affidavits, was made to vacate the default and judgment on the ground that the same had been prematurely entered. The motion was denied and bill of exceptions was settled upon this motion; no appeal, however, was taken from the order of the court denying the motion, but appeal was taken from the judgment only. Appellants contend that even though the bill of exceptions was

settled in connection with the motion, yet, inasmuch as the bill of exceptions points out the premature entry of the judgment, it reveals an error made by the court before judgment, and therefore is available to them on the appeal from the judgment. In support of this contention, the appellants rely largely upon the statute defining what constitutes the record on appeal, being section 7112, Revised Codes, which reads as follows: "On an appeal from a final judgment, the appellant must furnish the court with a copy of the notice of appeal, of the judgment-roll or of such parts thereof as may be necessary to be considered on the appeal, and of any bill of exceptions upon which the appellant relies. Any statement of the case settled after the decision of the motion for a new trial, when the motion is made upon the minutes of the court, as provided for in section 6796 (1173), or any bill of exceptions settled as provided for in section 6787 (1154) or in section 6788 (1155), or used on the motion of a new trial, may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing a new trial." The particular language relied upon is found in the first sentence, in which it is stated that appellant must furnish the court with a copy of the judgment-roll and of any bill of exceptions upon which the appellant relies. The statute provides that immediately after entering judgment, the clerk must attach together and file certain papers therein mentioned, including all bills of exceptions taken and filed, which shall constitute the judgment-roll. (Rev. Codes, sec. 6806.) It is argued that, inasmuch as the statute includes within the judgment-roll all bills of exceptions taken and filed, and inasmuch as the legislature provided in section 7112 that the record on appeal shall consist of the judgment-roll and any bills of exceptions upon which the appellant relies, it intended to include any bills of exceptions so relied upon, no matter when or for what purpose it was settled, and that therefore a bill of exceptions prepared upon motion to vacate default and judgment is such a bill of exceptions as is so contemplated. However, in determining

this question it is necessary to consider the whole of section 7112. It is to be noted that in the latter part of the section it is provided that "any bill of exceptions settled as provided for in section 6787 (1144) or in section 6788 (1155), or used on the motion of a new trial, may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing a new trial."

It must be remembered that the judgment-roll must be made up immediately upon the entry of the judgment, and it therefore can contain only such bills of exceptions as were on file at the time of the entry of the judgment. Section 6788 provides that bills of exceptions may be settled after judgment, covering matters occurring upon the trial. Such bills of exceptions, not being filed at the time of the entry of the judgment, cannot be deemed a part of the judgment-roll; but, inasmuch as they contain exceptions to the proceedings before the entry of judgment, they are material in considering any appeal from the judgment. Reading the section 7112 in its entirety, it is our opinion that it was the intention of the legislature in providing for judgment-roll and bill of exceptions, to include only such bill of exceptions as was settled under either section 6787 or 6788. As the bill of exceptions in question was not settled under either section, nor used on a motion for new trial, it cannot be used on appeal from the judgment.

Appellants have also cited in support of their contentions the case of *Foley* v. *Foley*, 120 Cal. 33, 65 L. R. A. 147, 52 Pac. 122, but the cited case is not applicable. In that case the motion to set aside default was made before judgment, and under the statutes of California no appeal could be taken from the order overruling such motion. In this case, however, the motion was made after judgment and the order denying the motion is an appealable order. (Rev. Codes, sec. 7098.) If this court should consider a bill of exceptions made on motion to set aside judgment and default on an appeal from the judgment, then such action would to a great extent nullify the

provisions of the statute providing for appeal from orders made after judgment. As appellants had a clear right of appeal from the order denying their motion to set aside default and judgment, it would be improper for this court to consider the matters shown upon such motion when no appeal had been taken from the order.

We are reluctant to refuse to consider matters which appellants have attempted to bring before this court in a *bona fide* effort to present alleged errors for review, but it is not a question of our disposition in the matter, but a question of the power or lack of power of this court. Where the rules of practice are clear and unambiguous, such as exist in regard to the right of appeal from an order vacating judgment and default, we do not feel that this court should step aside from the issues properly presented to save appellants from the results of their action in mistaking their remedy. It is the conclusion of the court upon review of the above-mentioned statutory provisions that, on appeal from the judgment, matters contained in the bill of exceptions cannot be considered.

We therefore are compelled to reverse the order heretofore made and affirm the judgment.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES COOPER and HOLLOWAY, concur.

MR. JUSTICE GALEN, deeming himself disqualified, takes no part in this decision.

OSTERHOLM, ADMR., APPELLANT, v. BUTTE ELECTRIC RY. CO. ET AL., RESPONDENTS.

(No. 4,383.)

(Submitted April 22, 1921. Decided May 23, 1921.)

[199 Pac. 252.]

Personal Injury—Death—Street-cars—Negligence—Evidence—Insufficiency—Intoxication—Presumptions—Burden of Proof—Appeal and Error—Inadequacy of Damages.

Personal Injuries—Death by Negligence—Earning Capacity—Immaterial Evidence.

1. Where the complaint in an action to recover damages for the death of a miner from a street railway company alleged that decedent had been earning and was capable of earning, $4 per day, evidence as to wages paid miners at the time of the trial was immaterial and properly excluded.

Same—Intoxication—Evidence—Admissibility.

2. Proof of decedent's intoxication at the time he was struck by a street-car while attempting to cross the street at a place where there was no crossing was admissible.

Same—Negligence—Presumption of Due Care—Improper Instruction.

3. An instruction that the law presumes that plaintiff's decedent at the time of the accident was exercising ordinary care for his safety was properly refused where the question of negligence on the part of defendant and that of contributory negligence on his part were issues of fact to be determined by the jury.

Same—Negligence—Burden of Proof.

4. Since every person is bound to exercise his intelligence to discover and avoid danger, the burden of proving that his intestate did so at the time he was injured was upon plaintiff, the burden not being upon defendant to show that it was not guilty of negligence.

Same—Appeal and Error—Increasing Award of Jury—Supreme Court—Jurisdiction.

5. *Quaere:* While the supreme court may reverse a judgment and order a new trial where the damages awarded are clearly inadequate under the evidence, may it, of its own motion, award adequate damages in such a case, without ordering a new trial?

Same—Evidence—Insufficiency—Inadequacy of Damages—When New Trial Improper.

6. Where the evidence of plaintiff in an action for damages for death by negligence was wholly insufficient to warrant a judgment in his

---

2. On intoxication as evidence of negligence, see notes in 25 Am. St. Rep. 39; 5 Ann. Cas. 72; 19 Ann. Cas. 1176; Ann. Cas. 1914D, 114; 40 L. R. A. 143; 47 L. R. A. (n. s.) 733, 740; 50 L. R. A. (n. s.) 568.

favor and the court committed error in not granting defendant's motion for a directed verdict, a judgment in his favor for $51 and costs will not be reversed on the ground of inadequacy of damages or a new trial ordered.

Appeals from District Court, Silver Bow County; Edwin M. Lamb, Judge.

ACTION by Victor Osterholm, as administrator of the estate of Edus B. Lund, against the Butte Electric Railway Company and others. From a judgment for plaintiff for an alleged insufficient amount, and from an order denying a motion for new trial, plaintiff appeals. Affirmed.

Mr. H. A. Tyvand and *Mr. J. O. Davies*, for Appellant, submitted a brief; *Mr. Davies* argued the cause orally.

The evidence of intoxication of the injured party, Lund, was wholly immaterial, not within the issues, and only tended to prejudice the minds of the jurors, and the ruling of the trial court in permitting this evidence was clearly erroneous. (*Herzig* v. *Sandberg*, 54 Mont. 538, 172 Pac. 132.)

The trial court committed error in rejecting plaintiff's offered instruction No. 11. In this instruction the plaintiff requested the court to charge the jury that the law presumed. Lund was in the exercise of ordinary care for his own safety at the time of the injury. This instruction correctly states the law. A similar instruction to this one has been frequently given by the trial courts, and instructions stating a similar proposition of law on behalf of defendant has also been frequently given, and have on every occasion been approved by this court or at least never held to be erroneous. This instruction not only states the common law, as announced by this court, but is also embodied in our statutes. (*Monson* v. *La France Copper Co.*, 39 Mont. 50, 133 Am. St. Rep. 549, 101 Pac. 243; Rev. Codes, sec. 7962, subd. 4.)

The verdict for $51 in this case was and is just as clearly against and contrary to the law as given to them by the court, as if it had instructed the jury to return a verdict in favor

of the plaintiff and the jury had returned a verdict in favor of the defendants. A verdict of the jury contrary to instructions of the court must be set aside. (*Allen* v. *Bear Creek Coal Co.*, 43 Mont. 269, 115 Pac. 673; *McAllister* v. *Rocky Fork Coal Co.*, 31 Mont. 359, 78 Pac. 595; *Murray* v. *Heinze*, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714.)

The verdict was grossly inadequate. This court has had this same question before it on a previous occasion in case of *Flaherty* v. *Butte Electric Ry. Co.*, 42 Mont. 89, 111 Pac. 348, and has held that the courts of Montana have the power to grant the relief demanded by such a situation. If the trial court did not abuse its discretion in granting a new trial in the *Flaherty Case*, then it certainly follows as a matter of course that the trial court was bound under the law to grant relief in this case, and its refusal to do so was error. In the *Flaherty Case* the verdict was for $100. The action was for loss of earnings to a father of his minor child until he reached twenty-one years of age. There was no evidence whatever introduced whereby a jury could measure or determine the father's damages; the measure of damages being left solely to the discretion of the jury.

Under situations like this there can be no question but that the court has the power to fix the damages, even without any statute, under the general powers given to the court by our Constitution, but our legislature has directly given to this court such power in section 6253 of the Revised Codes in the following language: "The supreme court may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had."

This language is plain and unambiguous, and under it there can be no question but that this court has the power to enter any judgment which it deems proper in any case brought to it on appeal, either from a judgment or order denying a new trial.

In the case of *McDermott* v. *American Bonding Co.*, 56 Mont. 1, 179 Pac. 828, this court exercised the power given to it by the Constitution and this section of our Code to increase the amount of damages awarded the plaintiff. No distinction can be drawn between that case and the present one. The amount of damages which the plaintiff is entitled to in this case is certainly just as definite, fixed and ascertainable under the evidence as was the damages in that case. Among the cases supporting the view that the supreme court may increase the amount of judgment of the lower court are the following: *Gans* v. *Woolfolk*, 2 Mont. 458; *Bielenberg* v. *Eyre*, 44 Mont. 397, 120 Pac. 243; *Atherton* v. *Fowler*, 46 Cal. 320; *Spence* v. *Damrow*, 32 Neb. 112, 48 N. W. 880; *Tolchinsky* v. *Schiff*, 47 Misc. Rep. 371, 93 N. Y. Supp. 1073; *Warner* v. *Talbot*, 112 La. 817, 104 Am. St. Rep. 460, 66 L. R. A. 336, 36 South. 743; *Englert* v. *New Orleans R. & L. Co.*, 128 La. 473, 54 South. 963.

Messrs. Templeman & Sanner, Mr. Peter Breen, Mr. W. L. Murphy and *Mr. Fred J. Furman*, for Respondents, submitted a brief; *Mr. Furman* argued the cause orally.

Counsel for appellant cite cases in which jury verdicts were set aside and new trials ordered because they were inadequate. An examination of these citations shows most striking dissimilarity with the cause at issue. Lund is a single man, without dependents, apparently. The jury may well have taken the view that no one was financially interested in the estate except the administrator and his attorneys. That this was unquestionably their view is indicated by the fact that while the jury were deliberating upon their verdict in this cause they requested to be returned into the courtroom and further instructed by the court. When they were so returned they asked the judge to instruct them concerning the smallest verdict which would carry costs, and they were instructed by the court, in the absence of counsel, that a verdict of more than $50 carried costs,—a circumstance which shows clearly that the jury

desired to enable the administrator to judicially determine liability for the death of Lund without attaching personal responsibility to himself for the costs. The trial court could readily take the view that the verdict was adequate. Other courts have so held. The supreme court of Tennessee, in the case of *Haley* v. *Mobile & O. R. Co.*, 7 Baxt. 239, hold that five dollars is adequate. One dollar is adequate: *Smith* v. *Chicago, M. & St. P. Ry. Co.*, 6 S. D. 583, 28 L. R. A. 573, 62 N. W. 967. One cent is adequate: *Jenkins* v. *Hankins*, 98 Tenn. 545, 41 S. W. 1028. Funeral expenses: *Deluna* v. *Union Pac. Ry. Co.*, 130 App. Div. 386, 114 N. Y. Supp. 893. one hundred and seventy-five dollars is adequate in; *Leahy* v. *Davis*, 121 Mo. 227, 25 S. W. 941. Six cents: *Silberstein* v. *Wm. Wicke Co.* (Super. Ct.), 22 N. Y. Supp. 170. The cases cited by counsel are all readily distinguishable from the one at trial. There is no widow here; no orhpan; no dependent mother; nobody, apparently, to benefit but the administrator and his counsel.

MR. CHIEF COMMISSIONER POORMAN prepared the opinion for the court.

This is an appeal by plaintiff from a judgment entered on a verdict in his favor for the sum of $51 and costs, and from an order overruling the plaintiff's motion for a new trial.

The defendant corporation, on the fifteenth day of July, 1915, and for several years prior to that time, operated a street railway along and over Florence Avenue, in Butte, Montana; the track extending practically north and south. At 11:30 o'clock P. M. on the fifteenth day of July, 1915, and at a point on said Florence Avenue at or near its intersection with B Street, the plaintiff's intestate, Edus B. Lund, was struck by an electric car operated by employees of the defendant company, and was so badly injured that he died on the following day. Plaintiff alleges that the deceased came to his death by reason of the negligence of defendant's employees in the operation of said car, and for defects in the car. The grounds of negligence charged in the complaint are (a) danger-

ous rate of speed; (b) car not under control; (c) insufficient headlight; (d) failure to keep proper lookout; (e) failure to ring bell or give warning of the approach of the car. The plaintiff further alleges that the deceased, at the time of his death, was strong, able-bodied, a miner by occupation, twenty-one years of age, life expectancy forty-two years, earning and capable of earning $4 per day. Damages were asked in the sum of $60,000.

The answer of the defendants contains admissions and denials, but it is sufficient here to say that the negligence charged against the defendants is denied, and that defendants charge the deceased with contributory negligence in the following particulars: That he left the open and used portion of Florence Avenue, and attempted to cross the car-track at a place where Florence Avenue was unopen, uneven, rough and unguarded, and where there was no crossing, and at a place other than a regular crossing, and at a time when a car was approaching; and that whatever injuries were suffered by the deceased were caused as a result of his own contributory negligence.

Leonard Gustafson, a witness called by the plaintiff, testified that on the day of the accident the deceased hired a horse and buggy, and that the witness and deceased went to a funeral. In detailing the travel and course during the day he states: That they first went to the undertaker's place, then to the cemetery, then to the Five Mile House, then to the Nine Mile House, then to the Ten Mile House, then to the Mountain View Hotel, and that they left the latter place a few minutes before 11 o'clock at night; that at that time the witness was driving. It was pretty dark, and he could not see the road very well. "When we came to Florence Avenue, we came into a little ditch with the front wheel. We had to step out of the buggy, both of us. I got out of the buggy first. * * * When I got out of the buggy, I was looking around, and I seen the street-car track right there, so I tried to get the horse and buggy over. When I looked around, I was right on the side of the buggy. Lund, he was right close to me. I

looked north and south, both directions. I looked around. I didn't see any street-car. Then I tried to drive the horse over. I drove it over. When I got across with the horse, I was looking after my partner, and at the same time I seen the street-car coming. It was about ten feet or fifteen off from Ed [deceased]. He was following me and in a northwest direction. He was in the middle of the car-track. The street-car knocked him down and * * * dragged him about thirty feet." Witness further stated: That he drove about ten, fifteen, or twenty feet across the track and stopped; that he neither saw nor heard the car until just before it struck Lund; that he did not hear a bell; that he crossed the tracks at an angle in a northwest direction: that the street-car track at that place was straight for at least two blocks, then there was a curve; that he and Lund had been drinking some during the day, but that neither of them was drunk at the time of the accident; that he walked and drove the horse across the track; that at the time he saw Lund on the track there was a little light on the car, "so I could see Ed was following me, and at the same time the street-car knocked him down * * * he was standing and following me; * * * it was a little light on the car. I could see a little ahead at the time. It was an open car."

Angus McLeod, called as a witness by plaintiff, testified that he was riding on the car at the time Lund was struck; that the car was traveling at a moderate rate of speed, from twelve to fifteen miles per hour; the motorman was at his proper station; the lights were burning brightly in the car at all times; that it was an open car, nothing unusual about the machinery; that it was a straight track; that he noticed the headlight "burning bright" at the last curve; and that he did not notice the headlight after that time, but all other lights were burning brightly when the car stopped. The stop was made from fifteen to twenty-five feet after the brakes were applied; that it was a "sudden stop—a very quick stop."

Victor Osterholm, the plaintiff, was called, and testified that he was on the ground the following day; that the buggy crossed the car-tracks "kind of south side of B Street, going northwest"; that both B Street and Florence Avenue were open and traveled streets; that "the street-car track is straight for about eighteen rails, track rails. A rail is about thirty feet long." Witness further testified to finding a little spot of blood about thirty feet north of where the buggy crossed the track, but he saw no sign of the body having been dragged.

Joseph Armstrong, called by plaintiff, testified that both Florence Avenue and B Street were open streets at the time of the accident and that grading was going on there. Plaintiff's witnesses also testified that at the place where the buggy crossed the street-car track there were no planks between the rails; that the dirt was filled up to the top of the ties.

At the close of plaintiff's evidence, defendants moved for nonsuit, which was sustained as to defendant Wharton, and overruled as to the other defendants.

Witnesses for the defendants testified that they followed the tracks of the buggy, which was driven by Gustafson and deceased; that they crossed the street-car track in the vicinity of C Street, extending then in an easterly direction; that they turned in a northerly direction, parallel to the street-car track, which they followed for some little distance, between Florence Avenue and Massachusetts Street, where there was no road at all, and extending to a point about fifty or sixty feet from what is known as B Street. There the tracks turned abruptly toward the west and went down a bank, due to an excavation on Florence Avenue, in an angling direction toward the northwest, across the street-car tracks; that the streets at that point were plowed, and they were doing grading there; that there was an embankment of a foot or eighteen inches where the buggy went across; that the country there "looked like No Man's Land. It was kind of a lot of holes, like a plowed field, you know; very rough."

[60 Mont. 193.]

The motorman testified that he saw something on the track about seventy feet distant, which he thought was loose dirt; that he did not detect that it was a human body until he got close to it, within twenty or thirty feet; he then found it was a man lying down between the rails, with his head on a little bank of dirt. The motorman further testified that the headlight was burning at all times and that he could distinguish an object at a distance of 200 feet.

Defendants' Exhibits 1 and 2, being photographs of the place of the accident, clearly support the statements made by defendants' witnesses as to the character of the ground and of the crossing where the accident occurred.

The evidence of the defendants is further to the effect that there was not any defect in the headlight; that all the lights on the car, including the headlight, burn in series with four lamps in the car and one in the headlight; that, whenever the four lamps in the car are lit, the headlight is burning; that the street-car, at the time of the accident, stopped about opposite the buggy; and that Lund's body had been dragged about five feet. Witnesses for the defendants also testified that the deceased was drunk at 8 o'clock that night, and that both Lund and Gustafson, the driver, were drunk at the time of the accident. This fact was controverted by the plaintiff's witnesses. At the close of the testimony, the defendants asked for a directed verdict in their favor, which was overruled.

The specification of errors of plaintiff contains eight assign-
[1] ments; the first one being general, and the second and third to the effect that the court refused to admit evidence as to miners' wages at the time of the trial. This, we take it, was immaterial, as the plaintiff by his pleadings, had limited himself in this regard.

Assignments 4, 5, 6 and 7 take issue with the court in ad-
[2] mitting evidence upon the question as to whether the deceased was drunk at the time of the accident. These questions have been decided adversely to the contention of the appellant by this court in *Herzig* v. *Sandberg*, 54 Mont. 538,

172 Pac. 132, and in addition to that case we may cite here the following: *Buddenberg* v. *Charles P. Choutcau Trans. Co.*, 108 Mo. 394, 18 S. W. 970; *Rhyner* v. *City of Menasha*, 107 Wis. 201, 83 N. W. 303; *Ford* v. *Umatilla Co.*, 15 Or. 313, 16 Pac. 33; *McIntosh* v. *Standard Oil Co.*, 89 Kan. 289, Ann. Cas. 1914D, 112, 47 L. R. A. (n. s.) 730, 131 Pac. 151.

By assignment 8 the appellant takes issue with the court in [3] refusing to give its proposed instruction No. 11, which is: "You are instructed that the law presumes that the plaintiff's decedent, Edus B. Lund, was at the time of the injury to him, exercising ordinary care for his safety." Appellant contends that subdivision 4 of section 7962, Revised Codes, is authority for such an instruction. This statute is as follows: "That a person takes ordinary care of his own concerns." This statute, however, applies to a defendant as well as to a plaintiff, and one of the questions at issue here is whether the proper kind of care was used. The plaintiff charges negligence on the part of the defendants; the defendants charge negligence on the part of the plaintiff. The court has no more right to presume that the deceased used ordinary care than it has to presume that the defendants used ordinary care. This is one of the questions of fact at issue.

At the trial the plaintiff seemed to proceed upon the theory [4] that, having shown that the deceased met his death by being struck with the car, the burden was then upon the defendants to show that they were not guilty of negligence. However, this court has decided: "Every person is bound to an absolute duty to exercise his intelligence to discover and avoid dangers that may threaten him. When, therefore, a plaintiff asserts the right of recovery on the ground of culpable negligence of the defendant, he is bound to show that he exercised his intelligence to discover and avoid the danger, which he alleges was brought about by the negligence of the defendant." (*Sherris* v. *Northern Pac. Ry. Co. et al.*, 55 Mont. 195, 175 Pac. 271.)

Appellant contends that the damages awarded are inade-
[5] quate, and for that reason the judgment and order appealed from should be reversed, and the cause remanded for a new trial, or that this court should of its own motion award adequate damages, which the appellant fixes at $23,904, which he claims is the cost of an annuity yielding $100 per month. That a judgment may be reversed and a new trial ordered, where the damages awarded are clearly inadequate under the evidence, has been many times affirmed by this and other courts; but this court never has assumed to exercise the authority or power of "scaling a verdict upward." Appellant cites the following cases in this part of his brief: *Flaherty* v. *Butte Elec. Ry. Co.*, 42 Mont. 89, 111 Pac. 348; *Phillips* v. *London, S. W. Ry.*, 2 Q. B. Div. 78; *Rawitzer* v. *St. Paul City Ry. Co.*, 94 Minn. 494, 103 N. W. 499; *Meyer* v. *Hart*, 23 App. Div. 131, 48 N. Y. Supp. 904; *Marinai* v. *Dougherty*, 46 Cal. 26; *McCarthy* v. *St. Louis Transit Co.*, 192 Mo. 396, 91 S. W. 132; *Burns* v. *Merchants' etc.*, 26 Tex. Civ. App. 223, 63 S. W. 1061; *Usher* v. *Scranton Ry. Co.* (C. C.), 132 Fed. 405; *Thompson* v. *Burtis*, 65 Kan. 674, 70 Pac. 603; *Loevenhart* v. *Lindell Ry. Co.*, 190 Mo. 342, 88 S. W. 757; *Lane* v. *United Electric L. & W. Co.*, 90 Conn. 35, L. R. A. 1916C, 808, 96 Atl. 155; *Gans* v. *Woolfolk*, 2 Mont. 458; *Bielenberg* v. *Eyre*, 44 Mont. 397, 120 Pac. 243; *Atherton* v. *Fowler*, 46 Cal. 320; *Spence* v. *Damrow*, 32 Neb. 112, 48 N. W. 880; *Tolchinsky* v. *Schiff*, 47 Misc. Rep. 371, 93 N. Y. Supp. 1073; *Warner* v. *Talbot*, 112 La. 817, 104 Am. St. Rep. 460, 66 L. R. A. 336, 36 South. 743.

The respondents take issue with this contention of appellant and cite the following authorities: *Haley* v. *Mobile & O. R. Co.*, 7 Baxt. 239; *Such* v. *Cleveland etc. R. Co.*, 2 Ohio Dec. (Reprint) 352; *Smith* v. *Chicago, M. & St. P. Ry. Co.*, 6 S. D. 583, 28 L. R. A. 573, 62 N. W. 967; *Jenkins* v. *Hankins*, 98 Tenn. 545, 41 S. W. 1028; *De Luna* v. *Union Ry. Co.*, 130 App. Div. 386, 114 N. Y. Supp. 893; *Leahy* v. *Davis*, 121 Mo

227, 25 S. W. 941; *Silberstein* v. *Wm. Wicke Co.* (Super. Ct.), 22 N. Y. Supp. 170.

From our view of this case, these questions are not involved, [6] for here every act of negligence charged in the complaint is directly negatived by plaintiff's witnesses, except the lookout kept by the motorman, and that, to say the least, is thrown in doubt by the circumstances attending the injury. Just why deceased was on the track at that particular time, or how long he had been there, is not explained; whether he had just stepped on the track, or whether he had been there long enough for the motorman to see him in time to stop the car, or why he did not see that lighted, open car approaching him on a straight track of 540 feet, or what he was doing while Gustafson was walking and driving the horse across the track and ten or twenty feet beyond, and then stopping and looking to see what had become of Lund, are all matters unexplained. Had this cause been submitted to the jury on the evidence of plaintiff alone, and verdict returned for the defendants, it would have been amply sustained by the evidence, and then, when we add to this testimony that of the defendants as to the sufficiency of the lights, speed, control and condition of the car, the lookout kept by the motorman, the course followed by deceased in getting to and across the track, and the character of the ground which he passed over and the photographic evidence of the ground, we reach the conclusion that the defendants' motion for directed verdict should have been sustained on the general ground that the evidence of the plaintiff was insufficient to sustain a verdict and judgment in his favor.

If this were an appeal by the defendants, asking to have the verdict and order reversed, this court would be compelled to grant the reversal; but this is an appeal by the plaintiff from a judgment in his favor. The defendants (the respondents here) are not taking issue with the judgment, but, on the contrary, ask that both the judgment and the order appealed from be affirmed. To grant a reversal in this cause would be reversing a judgment and order at the instigation of the party—

in this case the plaintiff—on the sole ground that he failed in producing sufficient evidence to prove his cause.

We recommend that the judgment and order appealed from be affirmed.

PER CURIAM: For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

Affirmed.

Rehearing denied July 2, 1921.

BRIGGEMAN, APPELLANT, *v.* CORRIGAN, RESPONDENT.

(No. 4,387.)

(Submitted April 22, 1921. Decided May 23, 1921.)

[198 Pac. 443.]

Partition Fences—Contribution — Notice — Time — Nonsuit— Causes of Action—Limitations.

Partition Fences—Premature Construction—Nonsuit.

1. Section 2087, Revised Codes, provides that where one of several occupants of lands belonging to them in severalty desires a partition fence, the others must, within six months after written notice to that effect, construct their portion of such fence, failing in which the person giving notice may build it and recover the proportion of the expense due from them. Plaintiff in an action to recover by contribution defendant's share of a partition fence, two days before the expiration of the six-month period began its construction. *Held*, that defendant was entitled to the full period of six months before default could be predicated upon his failure to act, and that by acting before its expiration plaintiff forfeited his cause of action for contribution.

Limitations—Right of Action—Notice—Time.

2. Where a right of action granted by statute is dependent upon the expiration of a certain time, the limitation thus fixed is of the essence of the right, and one seeking to enforce it must show affirmatively that he has complied with its provisions.

---

1. For authorities on partition fences, see notes in 68 Am. Dec. 626; 11 Ann. Cas. 199.

[60 Mont. 205.]

Appeals from District Court, Powell County, in the Third Judicial District; Jeremiah J. Lynch, a Judge of the Second District, presiding.

ACTION by Joseph Briggeman against Anna C. Corrigan, executrix of the estate of Mary Corrigan, deceased. Defendant's motion for nonsuit was granted, and from the judgment and order denying a new trial, plaintiff appeals. Affirmed.

Cause submitted on brief of Appellant.

Mr. S. P. Wilson, for Appellant.

Under sections 2085 and 2086, Revised Codes, plaintiff made a *prima facie* case. The pleadings and proof of plaintiff show that the parties occupied their lands in severalty except that the northern part of defendant's land and section 15 of plaintiff's land were without a partition fence and were grazed by their stock in common. When plaintiff elected and desired to build the partition fence on the south line of section 15 it became defendant's obligation to contribute thereto. This obligation began with the construction of the partition fence by the plaintiff and continued until actual contribution should be made. Under section 2086 defendant had the option for three months after plaintiff had built the fence in question to build her portion, and failing for more than three months so to do she was liable to the plaintiff for one-half the partition fence. This was true by virtue of the obligations imposed by sections 2085 and 2086 and independent of section 2087, and without any notice whatever from the plaintiff to her. Defendant's lands being inclosed as the proof shows, she became liable under section 2086 to the plaintiff for one-half the partition fence between her lands and those of the plaintiff.

Plaintiff made a *prima facie* case under section 4535. This section imposes an absolute obligation upon the defendant as a coterminous owner to build one-half the partition fence between her lands and those of the plaintiff. It was contended

at the trial that this section applies only to fences already built and imposes no liability for the original building of a fence. The case of *Hoar* v. *Hennessy*, 29 Mont. 253, 74 Pac. 452, conclusively forecloses this contention. Under this section, when plaintiff's proof disclosed that he owned land coterminous to the lands of the plaintiff and that he desired to occupy it in severalty and that defendant had not chosen to let her land lie without fencing and when he built the partition fence between his lands and those of defendant he established a legal liability against defendant for contribution. There can be no basis for a holding that the provisions of section 4535 are restricted by the provisions of 2087. Each of these sections gives separate and distinct rights and neither of them repeals the other. In fact, if either of them did repeal the other, section 4535 and its re-enactment, Chapter 132, Laws of 1917, being later enactments than section 2087, would be controlling. The following cases illustrate the obligation imposed by partition fence statutes: *Bliss* v. *Sneath*, 103 Cal. 43, 36 Pac. 1029; *Maudlin* v. *Hanscombe*, 12 Colo. 204, 20 Pac. 619.

MR. COMMISSIONER JACKSON prepared the opinion for the court.

This action is to recover by contribution $92.35, alleged to be defendant's share of the cost of building a partition fence built by plaintiff between the property of the parties. The complaint is in three counts, the first based on section 2087, Revised Codes, the second on sections 2085, 2086, and the third on section 4535. Defendant admits severalty ownership of the lands of both, and that, previous to the building of the fence, the lands were without partition; admits the lands were occupied by the respective owners; admits that plaintiff built the fence; and denies all other allegations.

The record shows the ownership of the lands by the respec-
[1] tive parties; that both occupied their premises in severalty, which were fenced as against all, except that the northern

part of defendant's land and section 15 of plaintiff's land were without a partition fence, and were grazed by their stock in common; that plaintiff desired to have a partition fence between the lands, and thinks he delivered to defendant, on November 20, 1914, a notice dated November 25, 1914, in conformity with section 2087, Revised Codes; that on May 18, 1915, plaintiff started the construction of the partition fence, and built the whole thereof, completing the same some time early in June of the same year; that defendant has neglected to pay her proportionate share for the fence.

The trial was had to a jury, and at the conclusion of plaintiff's case, the defendant moved for a nonsuit on all three counts. Motion was granted. Plaintiff appeals from the judgment and the order denying a new trial, assigning as error the sustaining of the motion for a nonsuit; the ruling that the testimony introduced did not show plaintiff was entitled to any recovery under any of the causes of action; the denial of the motion for a new trial.

Sections 2085, 2086 and 4535, Revised Codes, have not the slightest application under the proof, as the most cursory examination will show. The showing made by plaintiff from the record plainly entitled him to relief, if any, under section 2087, and none other. But, instead of allowing the defendant the six months as required by statute, the plaintiff, two days prior to the expiration of that time, takes things in his own hands and builds the fence. It is not material that the six-month period had elapsed prior to the time of its completion. Defendant was entitled to every day of the six months before default could be predicated, and before defendant could take advantage of section 2087.

The right to sue under section 2087 is purely statutory. Without such a statute the right would not exist. "The rule [2] is well settled in the country that whenever a statute grants a right which did not exist at common law, and prescribes the time within which the right must be exercised, the limitation thus imposed does not affect the remedy merely, but is of the

essence of the right itself, and one who seeks to enforce such right must show affirmatively that he has brought his action within the time fixed by the statute." (*Dolenty* v. *Broadwater County*, 45 Mont. 261, 122 Pac. 919; *Eby* v. *City of Lewistown*, 55 Mont. 113, 173 Pac. 1163.) And so, in this case, the six months' time prescribed by the statute must have passed before the notifying party is entitled to act, and if he has acted before that, whether it be a day or a month, he has no cause of action, as the lapse of the entire time is of the essence of the right itself.

For the foregoing reasons, we recommend that the judgment and order appealed from be affirmed.

PER CURIAM: For the reasons given in the foregoing opinion, it is ordered that the judgment and order appealed from be affirmed.

Affirmed.

DONEY, APPELLANT, *v.* NORTHERN PACIFIC RY. CO. ET AL., RESPONDENTS.

(No. 4,338.)

(Submitted April 13, 1921. Decided May 31, 1921.)

[199 Pac. 432.]

Carriers—Railroads—Unjust Rates—Railroad Commission Act—Complaint—Insufficiency—Common Law—Presumptions—Right of Action—Saving Clause—Remedies—Procedure.

Railroads—Unreasonable Rates—Railroad Commission Act—Remedies Exclusive—Complaint—Insufficiency.

1. *Held*, that the remedies prescribed by Chapter 37, Laws of 1907 (Rev. Codes, secs. 4363–4399), for recovery of damages caused by the exaction of discriminatory or unreasonable freight charges, are exclusive, and that therefore a complaint based upon the common-law remedy and drawn in entire disregard of the provisions of the statute did not state a cause of action, the common-law remedies having been superseded by said chapter.

[60 Mont. 209.]

Same—Complaint—Jurisdictional Allegation.

2. Under section 4389, Revised Codes, an allegation that payment of alleged discriminatory or unreasonable freight charges was made in the county in which the action is brought is jurisdictional.

Same—Presumptions—Complaint—Insufficiency.

3. Since the presumption obtains that the railroad commission fixed and established reasonable rates in obedience to section 4375, Revised Codes, and that the rate as established is in accordance with the approved and published tariff, a complaint which fails to allege that freight charges were not in accordance with such tariff is defective.

Same—Railroad Commission—Established Tariff has Effect of Statute.

4. A tariff duly filed and published by the railroad commission has the force and effect of a statute and is binding alike upon the shipper and carrier, until modified by the tribunal authorized to change it.

Same—Railroad Commission Act—Remedies—Extent of Saving Clause.

5. The provision of section 4398, Revised Codes, that the Railroad Commission Act shall not have the effect of releasing or waiving "any right of action * * * by any person for any right, penalty or forfeiture which may have arisen or may hereafter arise under any law of this state," *etc.*, does not have the effect of saving the common-law remedy for recovery of excess freight rates, but refers to the remedies provided by the Act itself.

Same—Voluntary Reduction of Rates—Effect.

6. The voluntary reduction of a rate by a carrier does not make the prior rate unlawful, unreasonable or discriminatory or the basis of an action for damages.

Same—Unjust Rates—Remedies—Procedure.

7. A shipper deeming himself aggrieved by a rate fixed by the railroad commission because unjust, unreasonable or discriminatory, must proceed under section 4391, Revised Codes, if he desires to have it declared so; where no rate has been fixed or the one established is considered excessive, he must apply to the commission for investigation and determination of his contention, under section 4377, before he can maintain an action in the courts; and if his case is predicated upon freight charges made in excess of those fixed and established by the commission, his complaint must so allege and the action must be brought within twelve months from the date of payment, under section 4389.

Appeal from District Court, Lewis and Clark County; W. H. Poorman, Judge.

ACTION by Jabez Doney against the Northern Pacific Railway Company and the Butte, Anaconda & Pacific Railway Company. Judgment for defendants, and plaintiff appeals. Affirmed.

---

6. What are unreasonable and unlawful discriminations by carriers, see note in 11 Am. St. Rep. 647.

7. Matters to be considered by railroad commission in determining reasonableness of freight rates, see notes in Ann. Cas. 1916A, 8; Ann. Cas. 1918E, 1216.

Messrs. Walsh, Nolan & Scallon, for Appellant, submitted a brief and one in reply to that of Respondents; *Mr. Wm. Scallon* argued the cause orally.

The controlling, if not the only, question presented is whether an action for damages, like the present, or in latter-day parlance, an action for "reparation," may be maintained without showing a prior determination by the Railroad Commission. Plaintiff maintains the affirmative and contends that: At the time of the creation of the Railroad Commission, such a right of action existed: the Railroad Commission law has not taken away the right of action, nor the remedy by action; this law does not require a presentation to the commission of a claim for reparation; it does not give any power to the commission to grant reparation or to adjudicate or pass upon claims for damages; where a rate, unreasonable or discriminatory, has been corrected, and has gone out of existence, there is nothing over which the commission has any jurisdiction left, and nothing which can be brought before it, in so far as the past is concerned.

The action is not based on the Railroad Commission Law. Therefore, the Railroad Commission Law is in no manner a standard by which the sufficiency of the complaint is to be determined. That law makes no provision for any suit by a shipper for reparation, except where he is made to pay a rate in excess of that fixed by the commission. The action is based on the common law, the Constitution and the written law, other than the Railroad Commission Act.

Section 7, Article XV, of the Constitution declares that no discrimination in charges or facilities may be made between either places or persons. Therefore, no power exists anywhere to allow discrimination in charges or facilities or to impair the rule of equal rights. The legislature or the Railroad Commission, under the authority of the legislature, might make further prohibitions, if such were possible, but neither can restrict or limit the rules or prohibitions of the Constitution. Regardless, therefore, of the Railroad Commission Law, the rights

of the shippers in this respect are fixed. They were so fixed before the passage of the Railroad Commission Law. It seems self-evident, and, indeed, we do not understand that it is denied, that a shipper discriminated against would have a remedy by action, in the absence of the Railroad Commission Law. As we understand it, the defendant merely contends that the law takes the remedy away. At all events, we submit that the existence of such a right of action cannot be successfully denied. The common law gave the right of action in any case where a rate had been exacted from an individual which was unreasonable. That was the basis and the reason of the common-law action, whether the common-law action be regarded as existing only in cases where the charge was unreasonable or, also, whether the charge was discriminatory. In view of the constitutional provisions, it is not necessary to determine how extensive the common-law rules were, and whether they were limited to unreasonable charges, and whether or not they left unaffected discriminations between either persons or places. However, as to the common-law rule, its modern development and extension, we may refer to *Sullivan* v. *Minneapolis etc. Ry. Co.*, 121 Minn. 488, 45 L. R. A. (n. s.) 612, 142 N. W. 3; *Western Union Tel. Co.* v. *Call Pub. Co.*, 181 U. S. 92, 45 L. Ed. 765, 21 Sup. Ct. Rep. 561 [see, also, Rose's U. S. Notes]; Beale & Wyman's Railroad Rate Regulation, 1st ed., sec. 712 *et seq.;* Wyman's Public Service Corporations, secs. 1280–1292. This, however, may be said: Where the common-law rule was infringed, there was a right of action, and by parity of reasoning, where additional restrictions or obligations are imposed upon common carriers by the Constitution or the statute, or by judicial decisions regarding their common-law duties, an action would be the proper remedy where an individual is aggrieved.

The complaint shows that the rates complained of were unreasonable and also that they were discriminatory as against the plaintiff as a shipper of lumber, and as between plaintiff and other persons engaged in the same kind of business, and shipping to Butte Hill and between the places named. The

discrimination, therefore, resulted in a direct and individual damage to the plaintiff. For that, he could recover. (*Western Union Tel. Co.* v. *Call Pub. Co., supra.*)

There is nothing in the Railroad Commission Law that purports to affect our right of action. The only provision regarding complaints (sec. 4377) makes no reference whatever to reparation. It merely has to do with the justice and reasonableness of rates, *etc.*, and of such rates, *etc.*, made by the board itself. It would not apply to any rate not made or established by the board itself. The proposition that the Railroad Commission cannot grant reparation without express authority, either statutory or constitutional, does not seem to be open to question. The following cases seem decisive: *Santa Fe etc. Co.* v. *Atchison etc. Ry. Co.*, 21 N. M. 496, 155 Pac. 1093; *Murphy* v. *New York Cent. Ry.*, 170 App. Div. 788, 156 N. Y. Supp. 49.

The Act recognizes rights of action under the existing law and expressly provides, in effect, that no such action shall be affected by the Act. (Sec. 4398.) It is not necessary to argue the proposition that a pre-existing right of action is not destroyed by the creation of a statutory remedy different from the action, or even similar, unless the statute expressly, or by necessary implication, abolishes the right of action or the remedy by action. No such thing is done by this Act. We therefore assert the right to recover from a railroad company for unreasonable or discriminatory charges does not arise out of the Railroad Commission Law. Inasmuch as the law did not create the right, and did not provide for any action coextensive with the common law or constitutional right of action, this right is not destroyed, and such remedies as may be held to be provided for by the Railroad Commission Law are not exclusive. To hold under the statute, as it stands, that an application should be made to the commission before bringing suit in a case like this, would amount to a denial of justice and to a practical denial of the right of action.

There is a radical difference between such a law as ours and the Interstate Commerce Commission Law, as it now exists. Under the latter, reparation may be granted after hearing the carrier as well as the complainant. If not obeyed by the railway company, suit is brought upon the order. No other preliminary or intermediate action in court is necessary or allowed. (*Pennsylvania R. Co.* v. *Stineman C. M. Co.*, 242 U. S. 298, 61 L. Ed. 316, 37 Sup. Ct. Rep. 118.) Under a law of that kind, a system fairly logical and workable is established or can be evolved. This has been done by judicial determinations. No such thing can be done under ours.

The respondents in their brief admit that there is no provision in the Montana Railroad Commission Law giving power to the board to make rates retroactive or to allow reparation to a shipper. Notwithstanding this admission, respondents still insist that no action can be maintained by a shipper without first applying to the board, and applying, not for reparation, but for modification of the rate, and appealing to the court to review the determination of the board as to the rate, if dissatisfied with the ruling of the commission as to the rate. The supreme court of Washington, in a case decided after that of the *Hewitt Logging Co.* v. *Northern Pacific Ry. Co.*, 97 Wash. 597, 3 A. L. R. 198, 166 Pac. 1163, cited and relied upon by respondents, *viz.*, *Belcher* v. *Tacoma Eastern R. Co.*, 99 Wash. 34, 168 Pac. 782, 786, in referring to its decision in the last-mentioned case and to the conclusion therein reached, said: "It would be puerile to hold that the claim was barred for failure to present it to the commission, if that body would have had no authority to entertain it, had it been submitted to their consideration." So here it would be puerile to say that a claim for reparation should have been presented to the commission when it had no power to entertain such a claim.

Messrs. Gunn, Rasch & Hall, for Respondent, Northern Pacific Railway Company, and *Mr. L. O. Evans, Mr. W. B. Rodgers* and *Mr. D. M. Kelly,* for Respondent Butte, Anaconda

& Pacific Railway Company, submitted a brief; *Mr. E. M. Hall* argued the cause orally.

Does the complaint state facts sufficient to constitute a cause of action on the theory that the rates charged were in excess of the tariffs in force? Section 4389, Revised Codes, provides for actions by any person or shipper against the railroad to recover amounts paid to any railroad "in excess of the rates, tolls or charges fixed and established by the board for such services." This section further provides that such action shall be brought in the district court of the county in which the payment was made and "shall be brought within twelve months from the date of such payment." If the plaintiff claims that the rate from Evaro and Schley was fixed by the Railroad Commission at ten cents per hundred pounds and that the defendants collected an amount in excess of such rate, then his action would be under the above section, and the complaint fails to allege that the payment was made in Lewis and Clark county, and also fails to allege that the action was brought within twelve months from the date of such payment. Payment in this county is necessary in order to give the court jurisdiction of the subject of the action in this county. The time within which the action must be brought under the above section is not a mere statute of limitation, but is of the essence of the right itself, and one who seeks to enforce such right must show affirmatively in his complaint that he has brought his action within the time fixed by the statute. (*Hewitt Logging Co.* v. *Northern Pac. Ry. Co.*, 97 Wash. 597, 3 L. R. A. 198, 166 Pac. 1153; *Dolenty* v. *Broadwater County*, 45 Mont. 261, 122 Pac. 919; *Atlantic Coast Line R. Co.* v. *Burnette*, 239 U. S. 19, 60 L. Ed. 226, 36 Sup. Ct. Rep. 75.)

The Railroad Commission Law of Montana covers the questions of rates, rebates, discriminations, unjust and unreasonable rates and other matters relating to intrastate shipments in this state, and makes the railway commission the rate-fixing body and the tribunal to first determine the questions of discrimination or unreasonableness of rates instead of the railroad

companies or the courts. The board's orders are final and conclusive as to orders affecting rates or charges. (*State ex rel. Board of Railroad Commrs.* v. *District Court*, 53 Mont. 229, 163 Pac. 115.) No provision is found in said Act giving the Board power to make rates retroactive, nor is there any express provision in said Act authorizing the board, in the event that it determines under section 4377, or the court determines under section 4384 or 4391, that any rate fixed by the board is unjust or unreasonable, to allow reparation to the shipper for the amount paid during the time such rate as fixed by the board was in force. Under the Montana law, until a rate is modified or canceled by the commission or the court, it is a valid rate, and a shipper cannot recover freight based on such valid rate during the time it was in effect. The shipper's remedy is to promptly have the rate modified, if unreasonable, by the commission or by the court in actions to review the determination of the board. (*Frank A. Graham Ice Co.* v. *Chicago, M. & St. P. Ry. Co.*, 153 Wis. 145, 140 N. W. 1097; *Northern Pac. Ry. Co.* v. *Solum*, 247 U. S. 477, 62 L. Ed. 1221, 38 Sup. Ct. Rep. 550.) Our statute differs from the federal Act in that under the latter Act the Interstate Commerce Commission is expressly authorized to order the railroad to pay to the complainant the sum it may find he has been damaged by reason of an unjust rate or discrimination in violation of the Act. (See secs. 8581–8584, U. S. Comp. Stats. 1916.) Under the Interstate Commerce Act, when a person seeks to recover back money which it is claimed he was required to pay in excess of some established interstate rate, or where he seeks to recover damages for discrimination practiced against him, or whenever he attacks the reasonableness of a rate, he is required to present his claim to the Interstate Commerce Commission for examination and adjustment before he can bring an action in the courts, notwithstanding the provisions of section 22 of said Act, that nothing herein "contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition

to such remedies." (*Robinson* v. *Baltimore-Ohio R. Co.*, 222 U. S. 506, 56 L. Ed. 288, 32 Sup. Ct. Rep. 114; *Mitchell Coal & Coke Co.* v. *Pennsylvania Ry. Co.*, 230 U. S. 247, 57 L. Ed. 1472, 33 Sup. Ct. Rep. 916; *Howard Supply Co.* v. *Chesapeake & Ohio Ry. Co.* (C. C.), 162 Fed. 188; *Franklin* v. *Philadelphia etc. Ry. Co.* (D. C.), 200 Fed. 134; *United States* v. *Merchants' & M. Traffic Assn.*, 242 U. S. 178, 61 L. Ed. 233, 37 Sup. Ct. Rep. 24.) The reasoning in the above cases applies with equal force to our statute and to the lack of jurisdiction of the courts to pass upon the reasonableness of the rates and discriminations before the commission has taken action thereon. In other words, before any shipper can recover in the courts damages for excess rates or discriminations, the discrimination or reasonableness of the rate must first be passed upon by the special tribunal expressly created and authorized by law to handle such matters. The fact that the Railroad Commission is not authorized, upon determining that a rate is unreasonable or discriminatory, to order reparation, does not prevent a shipper, after the rate has been so determined by the special tribunal created for that express purpose, from maintaining an action in court to recover damages sustained by him as a result of such unreasonableness or discriminatory rate. His action would be based upon the fact that such rate had been so declared by the proper tribunal, and the court would merely determine the amount of damages, if any, sustained. The cases of *Santa Fe etc. Min. Co.* v. *Atchison etc. Ry. Co.*, 21 N. M. 496, 155 Pac. 1093, and *Murphy* v. *New York Cent. Ry.*, 170 App. Div. 788, 156 N. Y. Supp. 49, cited by appellant, in no way conflict with the above proposition.

Of course a voluntary reduction of a rate by a carrier would not make the prior rate unlawful, unreasonable or discriminatory and the basis for an action for damages.

Wisconsin has a railway commission law very similar to that of this state, and the supreme court of Wisconsin has held that a shipper must first present his claim to the Railway Commission for the reasonableness of the rate to be determined by

that board before he can maintain an action in court. (*Frank A. Graham Ice Co.* v. *Chicago, M. & St. P. Ry. Co.*, 153 Wis. 145, 140 N. W. 1097; see, also, *Hewitt Logging Co.* v. *Northern Pac. Ry. Co.*, 97 Wash. 597, 3 L. R. A. 198, 166 Pac. 1153; *Manufacturers' Ry. Co.* v. *United States*, 246 U. S. 457, 62 L. Ed. 831, 38 Sup. Ct. Rep. 383; *State ex rel. City of Billings* v. *Billings Gas Co.*, 55 Mont. 102, 173 Pac. 799; *Beadle* v. *Kansas City etc. R. Co.*, 51 Kan. 248, 32 Pac. 910; *Windsor Coal Co.* v. *Chicago & A. R. Co.* (C. C.), 52 Fed. 716.)

Notwithstanding the fact that the legislature has created a special tribunal to regulate and determine railroad rates, facilities, discriminations, *etc.*, in this state, and enacted legislation providing the procedure to be followed and the remedies applicable for the enforcement of the rights of shippers, as defined in section 7, Article XV, of the Constitution, and for the purpose of making these provisions of the Constitution more effective, speedy and certain, the appellant contends that he can wholly ignore this tribunal and this legislation and proceed as if no Railroad Commission Law had ever been enacted.

The above provision of the Constitution merely prohibits the charging of a greater amount for a shorter haul when the transportation is limited to the carrier's own line. It has been repeatedly held that such a prohibition against charging a greater amount for a short haul than is charged for a long haul has no application to rates relating to transportation extending over more than one line, that is, to joint rates. (*E. R. Darlington Lumber Co.* v. *Missouri Pac. Ry. Co.*, 243 Mo. 224, 147 S. W. 1052; *Atchison etc. Ry. Co.* v. *Denver etc. Ry. Co.*, 110 U. S. 667, 28 L. Ed. 291, 4 Sup. Ct. Rep. 185; *Commonwealth* v. *Chesapeake & O. Ry. Co.*, 115 Ky. 57, 72 S. W. 361; *Chicago & Northwestern Ry. Co.* v. *Osborne*, 52 Fed. 912, 3 C. C. A. 347; *United States* v. *Mellen* (D. C.), 53 Fed. 229; *Parsons* v. *Chicago & N. W. Ry. Co.*, 63 Fed. 903, 11 C. C. A. 489; affirmed in 167 U. S. 447, 42 L. Ed. 231, 17 Sup. Ct. Rep. 887; *Interstate Commerce Commission* v. *Cincinnati etc. Ry. Co.*, 56 Fed. 925.)

As neither the common law nor our statute (sec. 4386) gives a right of action against a railroad for discrimination, such as plaintiff alleges, when the rate is a joint rate, instead of a rate confined to "its route or line," it follows that the complaint does not state a cause of action under our Constitution or the common law, as it expressly alleges that this freight was handled over the lines of two different routes.

MR. JUSTICE GALEN delivered the opinion of the court.

This action was brought by the plaintiff to recover damages for alleged discriminatory and unreasonable freight charges collected by the defendants on certain lumber shipments. Separate general demurrers were interposed by each of the defendants to the plaintiff's second amended complaint, which were sustained by the lower court and judgment entered dismissing such complaint. The appeal is from the judgment.

Three specifications of error are assigned by the plaintiff, involving but one question, *viz.*: Does the complaint state facts sufficient to constitute a cause of action? The second amended complaint, after alleging the corporate character of the defendants and the ownership and operation by the Northern Pacific Railway Company as a common carrier of a railroad between the stations of Evaro and Schley, in Missoula county, of St. Regis, in Mineral county, of Hamilton, in Ravalli county, and of Rocker, Butte, and Butte Hill, in Silver Bow county, and the operation by the Butte, Anaconda & Pacific Railway Company of a railroad between Anaconda, Rocker, Butte and Butte Hill, alleges as follows:

"III. That the plaintiff, during the year 1914, was engaged in the business of shipping lumber and various articles of lumber from the said stations of Evaro and Schley to Butte and Butte Hill aforesaid.

"IV. That at all times in question herein, and particularly on and between the eighteenth day of April and the twenty-fourth day of November, in the year 1914, the said defendant Northern Pacific Railway Company received for transportation

and undertook to transport and deliver, or cause to be delivered, freight generally and particularly lumber and articles made of lumber, from all of the stations hereinafter mentioned on the line of the railroad of the Northern Pacific Railway Company to points on Butte Hill aforesaid, by transporting the same over its own line to the said station of Rocker on the line of the Butte, Anaconda & Pacific Railway Company, and there delivering the same to the Butte, Anaconda & Pacific Railway Company for transportation from Rocker and delivery at points on Butte Hill aforesaid, and that there was a connection between the said lines at Rocker.

"V. That on the eighteenth day of April, 1914, and the twenty-eighth day of November, 1914, and between the said dates, the said plaintiff delivered to the defendant Northern Pacific Railway Company, at the said stations of Evaro and Schley, for shipment from the said stations to Butte Hill, sundry quantities of lumber, to-wit, of the kind of lumber used in and around mines and designated mining timbers and stulls, amounting in the aggregate to 163 carloads, and that the same were shipped and transported in carload lots from the said stations of Evaro and Schley.

"VI. That the said defendant, as common carrier, accepted and received the said lumber from said plaintiff at the times and places hereinbefore mentioned, and undertook to transport the said lumber and cause it to be delivered and did transport the said lumber, and cause it to be delivered to a corporation known as the Butte & Superior Copper Company, Limited, at a point on Butte Hill; that the said defendant Northern Pacific Railway Company caused the said lumber to be delivered, as aforesaid, by transferring the same to the defendant Butte, Anaconda & Pacific Railway Company at the said station of Rocker; and that from said point the cars on which said lumber was loaded were hauled by the said defendant Butte, Anaconda & Pacific Railway Company and the lumber thereon delivered by it to the said consignee.

"VII. That the freight on said lumber was payable by plaintiff, that is to say, that the said plaintiff had agreed with the said consignee to deliver the lumber to the latter on Butte Hill at a price which included the freight, and that the said freight was payable at the point of delivery to the consignee.

"VIII. That the said defendants exacted from the said plaintiff, through the said consignee, and demanded and required payment of freight on said lumber as a condition of the delivery thereof, at the rate of eleven and one-half cents per 100 pounds, and the said plaintiff, through his said consignee, paid the freight therefor at said rate, and that the freight thus paid by the said plaintiff for the said lumber amounts in the aggregate to the sum of $11,157.01; that the said freight, to-wit, the moneys paid for the said freight charges, was paid to and collected by the defendant Butte, Anaconda & Pacific Railway Company.

"IX. That out of the said moneys so collected, the said Butte, Anaconda & Pacific Railway Company retained for its share the sum of one and one-half cents per 100 pounds; and that its charge for its services in the transportation and delivery of the said lumber was one and one-half cents per 100 pounds; and that the remainder of the moneys so collected for said freight, as aforesaid, was paid over by the Butte, Anaconda & Pacific Railway Company to the Northern Pacific Railway Company, and received and retained by it.

"X. That the Butte, Anaconda & Pacific Railway Company, in collecting the said freight, as aforesaid, from the plaintiff, through the said consignee, was acting as the agent of the Northern Pacific Railway Company, as well as for itself.

"XI. And the plaintiff further alleges that the said rate of freight charged and collected from the plaintiff, as aforesaid, was excessive and unreasonable, and that it was excessive and unreasonable to the extent of one and one-half cents per 100 pounds in the case of any and every carload exceeding 60,000 pounds in weight and in the case of every carload of less than 60,000 pounds in weight, said rate was excessive and unreason-

able to the extent that the charge made for such carload exceeded $60, and that on every carload of the freight hereinbefore referred to, more than $60 was collected.

"XII. That said rate was also discriminatory as against the plaintiff, and as between the plaintiff and other persons engaged in the same kind of business, and shipping similar articles over defendants' roads to the said point in similar circumstances, and even from greater distances, to-wit, from Hamilton and St. Regis aforesaid, and that, thereby, such other persons were given a preference over the plaintiff to the extent of said excessive rates; that the said rate was also discriminatory to said extent as against the said stations of Evaro and Schley, and as between the said stations and the said stations of Hamilton and St. Regis, and that it was necessary for the plaintiff to ship the said lumber from the said stations of Evaro and Schley.

"XIII. That the rate charged by and collected for and received by the Northern Pacific Railway Company for the transportation of the said lumber to Rocker and its delivery there to the Butte, Anaconda & Pacific Railway Company was also excessive, unreasonable and discriminatory as aforesaid.

"XIV. That the charge made and collected, as aforesaid, by the Butte, Anaconda & Pacific Railway Company for the transportation of lumber shipped by plaintiff, as aforesaid, was the regular rate charged by said defendant on similar articles of lumber delivered to it in carload lots at Rocker by the Northern Pacific Railway Company for delivery at Butte Hill, and that the said charge was made without any reference to the point of origin on the Northern Pacific Railway of the freight so transported; that the excessive charge over and above a reasonable rate or charge and the discrimination in charges hereinbefore set forth were in the charge made by the Northern Pacific Railway Company and the amount received by it for transportation of the said lumber to Rocker and the transfer there to the Butte, Anaconda & Pacific Railway Company.

"XV. That a rate or charge on said lumber, for handling and transporting the same from either Evaro or Schley aforesaid to Rocker and delivering the same at Rocker to the Butte, Anaconda & Pacific Railway Company, of eight and one-half cents per 100 pounds, in case of carloads in excess of 60,000 pounds and in case of carloads of 60,000 pounds or of a lesser weight, a total charge of $51 per car, would have been, respectively, a reasonable and sufficient rate to have charged therefor, and that such rates or charges were the highest reasonable rates to charge therefor, and that everything above them, or either of them, charged during said period to the plaintiff, was unjust, excessive, unreasonable and discriminatory, as hereinbefore more fully alleged.

"XVI. And plaintiff avers, on his information and belief, that during the whole of the said period, to-wit, on and between the aforesaid dates, the defendant Northern Pacific Railway Company was transporting and causing to be delivered by the Butte, Anaconda & Pacific Railway Company similar articles in similar circumstances and to all points on Butte Hill from Hamilton aforesaid, and for shippers shipping from Hamilton, for ten cents per 100 pounds, and from St. Regis aforesaid, and for shippers shipping from St. Regis, for eleven cents per 100 pounds; that the said rates were for carloads and were accompanied with a minimum requirement of 60,000 pounds; that is to say, that if the load actually shipped was less than 60,000 pounds, the defendants would collect as for 60,000 pounds; that the rate of ten cents per 100 pounds with a minimum requirement weight of 60,000 pounds per car would have been a sufficient rate to have charged from said stations of Evaro and Schley to Butte Hill and to said point of delivery to said consignee, and from each of them, and was the highest rate that could reasonably have been charged therefrom, and that everything above that charged during the said period to the plaintiff was unjust, excessive, unreasonable, and discriminatory.

"XVII. That the said station of Hamilton is situated on a branch road operated by the said Northern Pacific Railway Company and leaving the main line of the said Northern Pacific Railway Company's road at Missoula, Mont., and said station of St. Regis is on another branch road operated by said Northern Pacific Railway Company and departing from its main line west of Missoula; that the said stations of Evaro and Schley are situated on the main line of the Northern Pacific Railway Company and west of Missoula; that the distance from either of said last-named stations to Missoula is less than the distance from Hamilton to Missoula and less than the distance from St. Regis to Missoula, to-wit, that Hamilton is distant by said railroad forty-eight miles from Missoula; that St. Regis is distant from Missoula by said railroad seventy-eight miles; that Evaro and Schley are distant respectively from Missoula seventeen and twenty-two miles; that all freight going from Hamilton and St. Regis, as well as from Evaro and Schley and other points on the main line and branches of the road of the Northern Pacific Railway Company, and destined for Butte Hill, had to pass, and did pass, during the period in question, through the same yard of said defendant at Missoula, and that Rocker and Butte Hill are situated east of Missoula.

"XVIII. That no conditions or circumstances existed in favor of St. Regis or Hamilton as against either Evaro or Schley as a shipping point, and that no conditions or circumstances existed at Evaro or Schley or between either of said points and Missoula that would make it more expensive to handle or transport freight from these points, or that would, in any manner, require or justify a higher rate of freight, and that no greater service or different service was rendered to the plaintiff in connection with the transportation of said lumber by the defendants, or either of them, than was rendered by them, and each of them, to shippers of similar articles of lumber from Hamilton or St. Regis, and the said discrimination in rates between the said points and the plaintiff and shippers shipping

from Hamilton or St. Regis was unjust and not based upon any fact or condition justifying any difference in rates.

"XIX. Plaintiff further alleges that on or about the fifteenth day of January, 1915, the said defendants reduced the rate on lumber from said stations of Schley and Evaro, to-wit, on such lumber as had been shipped by plaintiff as aforesaid, to ten cents per 100 pounds, the other conditions remaining the same, and put into effect a schedule at the rate of ten cents per 100 pounds, as aforesaid; that thereby the rates from the said stations were put on an equality with the rates from Hamilton aforesaid, and reduced one cent below the St. Regis rate then in force, and that these reduced rates so established on January 15, 1915, have ever since, up to and including the time of the commencement of this action, remained in force.

"XX. That neither of said defendants was ever authorized by the Board of Railroad Commissioners of the state of Montana to make, charge, or receive any higher rate, either jointly or severally, from Evaro or Schley aforesaid to Rocker or Butte Hill than from Hamilton or St. Regis to Rocker or Butte Hill, or to make any discrimination in rates between Evaro or Schley and either Hamilton or St. Regis, to any point east of Missoula, by making lesser rates from Hamilton or St. Regis or otherwise.

"XXI. That the said defendants have collected and received, as aforesaid, excessive charges amounting in the aggregate to more than $1,070.21, and that the charges over and above ten cents per 100 pounds where the weight of the load exceeded 60,000 pounds, and in excess of $60 per car where the weight of the load was 60,000 pounds or less, amount to $1,070.21; that the amount collected, as aforesaid, from the plaintiff for each of said cars and loads, together with the numbers of the cars used in transporting the said lumber and the weight of each car, as well as the amount of the whole charge, are shown in a statement thereof annexed to this complaint marked 'Exhibit A' and made a part hereof, the same as if fully set forth herein.

"XXII. Plaintiff avers, on his information and belief, that payment of said sum to the plaintiff has been demanded on behalf of the plaintiff, but that the defendants have refused, and still refuse, to pay the same, or any part thereof."

The prayer is for judgment in the sum of $1,070.21, together with interest from the twenty-eighth day of November, 1914, and costs of suit.

We must confess our inability to clearly follow the argu-
[1] ment advanced by plaintiff's learned counsel. After a careful review of the record and of the briefs, and examination of the authorities cited, it is clear to us that the lower court was correct in sustaining the demurrer to the complaint, as it is attempted to plead a cause of action in utter disregard of the Railroad Commission Law. (Chap. 37, Laws 1907.) In defining their theory of the action, counsel for the plaintiff assert that it "is not based on the Railroad Commission Law. Therefore the Railroad Commission Law is in no manner a standard by which the sufficiency of the complaint is to be determined. * * * The complaint does not allege that the commission had fixed a rate and that defendants charged more than that rate." They contend that the action is based "on the common law, the Constitution, and the written law," rather than the Railroad Commission Law. Section 7 of Article XV of the Constitution, relied upon by the plaintiff, reads in part as follows:

"All individuals, associations, and corporations shall have equal rights to have persons or property transported on and over any railroad, transportation or express route in this state. No discrimination in charges or facilities for transportation of freight or passengers of the same class shall be made by any railroad, or transportation, or express company, between persons or places within this state; but excursion or commutation tickets may be issued and sold at special rates, provided such rates are the same to all persons. No railroad or transportation, or express company shall be allowed to charge, collect, or receive, under penalties which the legislative assembly shall pre-

scribe, any greater charge or toll for the transportation of freight or passengers to any place or station upon its route or line, than it charges for the transportation of the same class of freight or passengers to any more distant place or station upon its route or line within this state."

Under this provision, it is contended by the plaintiff: "A shipper from Evaro and Schley could not be subjected to any discrimination in charges or facilities, and as between Hamilton or St. Regis and Evaro and Schley, no discrimination is allowable." Granting plaintiff's contention, the language employed in the Constitution clearly indicates that there shall be legislation on the subject, and the legislature in 1907 having provided for a Board of Railroad Commissioners (Chap. 37, Laws 1907), and prescribed its powers, duties and functions, in the fixing of reasonable freight rates and the prevention of discrimination by independent carriers as well as joint carriers, its provisions are, in our opinion, exclusive in so far as plaintiff's alleged rights involved are legislated upon, and the remedies thereby prescribed must be followed. Were there no statute covering the subject, the plaintiff's contention for the existence of a common-law remedy would be deserving of serious consideration; but since whatever common-law remedies may have been available prior to the enactment of the statute have been superseded thereby, we must now look alone to existing legislation covering the subject. The "written law" relied upon by the plaintiff is the statutory law, and upon reference thereto it appears that plaintiff's exclusive remedy is by compliance with the provisions of section 4377 or 4389 of the Revised Codes, and he does not allege to have done or pretended to have done either, so that in our opinion the complaint does not state a cause of action upon any theory. It is our view that the statute creating the Board of Railroad Commissioners, enacted in 1907, and now embraced in sections 4363 to 4399, inclusive, of the Revised Codes, is *prima facie* within the constitutional limitations above quoted respecting the fixing of tariffs on freight shipments over various lines within the state

of Montana, and joint tariffs as regards connecting lines, and the prevention of discrimination in the rates charged and collected. If the contention of plaintiff be correct, then the Railroad Commission Law is a nullity, but question concerning its constitutionality is not raised on this appeal, and in the absence thereof, it will be conclusively presumed to be constitutional.

In paragraph XX of the complaint, it is alleged that the defendants were never authorized by the Board of Railroad Commissioners to make, charge or receive, either jointly or severally, a higher rate from Evaro or Schley to Rocker or Butte Hill than from Hamilton or St. Regis to Rocker or Butte Hill, or to make discrimination in rates between Evaro or Schley and from Hamilton or St. Regis to any point east of Missoula, by making lesser rates from Hamilton to St. Regis; but it is apparent that this allegation is not predicated on section 4389, Revised Codes, as it is not alleged that the amount paid to and collected by the defendants was in excess of the rates fixed and established by the Railroad Commission, and if it be plaintiff's claim that the rate from Evaro and Schley was fixed by the Railroad Commission at ten cents per hundred pounds, and that the defendants collected in excess of such rate, then his action would be under [2] the above section and the complaint fails to allege that the payment was made in Lewis and Clark county, and also fails to allege that the action was brought within twelve months from the date of such payment. Payment in Lewis and Clark county was necessary to give the court of that county jurisdiction in the first instance. (*Hewitt Logging Co.* v. *Northern Pacific Ry. Co.*, 97 Wash. 597; 3 A. L. R. 198, 166 Pac. 1153; *Atlantic Coast Line R. Co.* v. *Burnette*, 239 U. S. 199, 60 L. Ed. 226, 36 Sup. Ct. Rep. 75; *American Ry. Co.* v. *Coronas*, 230 Fed. 545, L. R. A. 1916E, 1095, 144 C. C. A. 599; *Corico* v. *Smith*, 97 Misc. Rep. 447, 161 N. Y. Supp. 293; *Bemett* v. *Grand Rapids & I. R. Co.*, 194 Mich. 64, L. R. A. 1917E, 322, 160 N. W. 424; *A. J. Phillips Co.* v. *Grand Western Trunk Ry.*

Co., 236 U. S. 663, 59 L. Ed. 774, 35 Sup. Ct. Rep. 444.) Clearly this allegation does not predicate plaintiff's right of recovery of the amount paid the defendants in excess of the rate established by the Board of Railroad Commissioners for such service upon the provisions of this section. However, further consideration of the effect of this allegation becomes unnecessary in view of the express waiver on the part of counsel of any reliance whatsoever upon the Railroad Commission Law.

Section 4375, Revised Codes, provides: "The power and [3] authority is hereby vested in the [State] Board and it is made its duty to adopt as soon as practicable after the organization of the board, all necessary rates, charges and regulations to govern and regulate freight and passenger tariffs. * * * Said board shall also have the power and it shall be its duty, to fix and establish for all or any connecting lines of railroad in this state reasonable joint rates of freight charges," *etc.* The presumption is "that official duty has been regularly performed." (Sec. 7962, subd. 15, Rev. Codes; *Beck* v. *Holland*, 29 Mont. 234, 74 Pac. 410; *Burton* v. *Kipp*, 30 Mont. 275, 76 Pac. 563; *Grant* v. *Williams*, 54 Mont. 246, 169 Pac. 286; *Stephens* v. *Conley*, 48 Mont. 352, Ann. Cas. 1915D, 958, 138 Pac. 189; *State* v. *Groom*, 49 Mont. 354, 141 Pac. 858; *Grant* v. *Williams*, 54 Mont. 426, 171 Pac. 276.)

It is also to be presumed that the law has been obeyed. (Sec. 7962, subd. 33, Rev. Codes; *Kerr* v. *Blaine*, 49 Mont. 602, 144 Pac. 566; *State* v. *Hopkins*, 54 Mont. 52, Ann. Cas. 1918D, 956, 166 Pac. 304.)

Sections 4385, 4386 and 4392, Revised Codes, impose heavy penalties on railroads for charging greater or less rates than those fixed by the Railroad Commission, and the presumption is that a railroad in charging a rate has complied with the law, and that the rate is in accordance with the published and approved tariff established by the Railroad Commission. (*Cincinnati etc. R. Co.* v. *Rankin*, 241 U. S. 319, L. R. A.

1917A, 265, 60 L. Ed. 1022, 36 Sup. Ct. Rep. 555; *New York Cent. & Hudson River R. Co.* v. *Beaham*, 242 U. S. 149, 61 L. Ed. 210, 37 Sup. Ct. Rep. 43.)

In *Charles H. Lilly Co.* v. *Northern Pacific Ry. Co.*, 64 Wash. 589, 117 Pac. 401, the plaintiff alleged unjust and illegal discrimination in rates and sought recovery of the excess paid by him. The court sustained the demurrer to the complaint because it failed to allege that the carrier had not complied with the provisions of the Act to regulate commerce. The court said: "It will be observed that the appellant does not allege that the carrier had not complied with the provision of the Act to regulate commerce with reference to filing a schedule of rates, nor does it allege that by the rate charged it exceeded the rate shown on the schedule. Since there is no allegation of a violation of the law in these respects it will be presumed there was no such violation."

The allegations of the second amended complaint are wholly insufficient to show that the freight charges paid by plaintiff upon shipments made by him were not in accordance with tariffs adopted and in force between such points at the time the shipments were made. A tariff duly filed and published [4] has the force and effect of a statute, binding alike upon the shipper and carrier until modified by the tribunal authorized to change it. (*Atchison, Topeka & S. F. Ry. Co.* v. *Young*, 102 Kan. 875, 171 Pac. 1156; *Pennsylvania Ry. Co.* v. *International Coal Co.*, 230 U. S. 184, Ann. Cas. 1915A, 315, 57 L. Ed. 1446, 33 Sup. Ct. Rep. 893.) The allegations of the complaint being insufficient to show that the lumber was not shipped under a duly adopted tariff then in force and effect, does the complaint state facts sufficient to constitute a cause of action, on the theory that the rates charged were in excess of the tariff in force? Section 4389 of the Revised Codes provides for action by any person or shipper against the railroad to recover amounts paid to any railroad "in excess of the rates, tolls or charges fixed and established by said board for

such services." This section further provides that such action shall be brought in the district court of the county in which the payment was made and "shall be brought within twelve months from the date of such payment."

Plaintiff cites and further relies upon section 4398, Re-
[5] vised Codes, which reads as follows: "This Act shall not have the effect to release or waive any *right* of action by the state or any person for any *right*, penalty or forfeiture which may have arisen, or may hereafter arise, under any law of this state, and all penalties accruing under this Act shall be cumulative to each other, and a suit for or recovery of one, shall not be a bar to the recovery of any other penalty." While this section provides that "the *right* of action by the state or any person for any *right*, penalty or forfeiture which may have arisen, or may hereafter arise, under any law of this state," *etc.*, it does not declare that the remedies for enforcing such rights are not to be governed by the Railroad Commission Law.

Section 4398, Revised Codes, differs in this respect from the provisions in the Interstate Commerce Act (sec. 8595, U. S. Comp. Stats. 1916; 24 Stat. 387), which provides: "* * * Nothing in this Act contained shall in any way abridge or alter the *remedies* now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."

The state of Washington in its Public Service Commission Law has a section the same as section 4398 of our statute. In the case of *Hewitt Logging Co.* v. *Northern Pacific Ry. Co.*, *supra*, the court in an instructive opinion construed this provision, and among other things said: "We may grant that the Constitution declares the common law, but it does not follow that the legislature may not occupy its acknowledged field and define procedures and fix limitations upon the assertion of the right preserved. The 'Public Service Commission Law' does not assume to take away the common-law right of action. The legislature has accepted the declaration of the Constitu-

tion at its full worth, and has by a complete statute endeavored to avoid all of the annoyances and collateral questions attending the assertion of the common-law remedy, such as the reasonableness of the rate in and of itself, and its reasonableness when compared to another rate, the character and extent of service, the attending circumstances, and the measure of recovery which it is said was never defined at common law [citing cases], and which it is said with equal gravity was as certain as a recovery can be upon an implied contract to pay money [citing cases].

"To define procedure, to make a condition precedent, and to fix a limitation does not destroy the force of the Constitution. On the contrary, a law so providing makes it efficient, certain, and uniform in its operation. The substantive right remains; that is, all the citizen can insist upon, for it is held, under authority without limit, that no litigant has a vested right in procedure so long as his right of action is not abolished. * * *

"To say that it is beyond the power of the legislature to provide for an inquiry by a board skilled in the technical science of freight and passenger rates as a prerequisite to the institution of a suit, and within a definite time, would be to assert the indefensible principle that the legislature could not pass any law of procedure where a right of action existed at common law. That the legislature intended to save all substantive rights is made plain by the Act itself. Section 104 provides: 'This Act shall not have the effect to release or waive any right of action by the state or any person for any right, penalty or forfeiture which may have arisen or may hereafter arise under any law of this state. * * * '

"And section 111 evidences the legislative intent that all actions brought after the passage of the Act should be governed by the terms of the Act in so far as it defined procedure. Section 111 saves only pending actions, while section 104 saves all substantive rights then accrued or thereafter to accrue. The object of the law was to fix a certain procedure,

applicable to all cases, and to avoid the confusion that would follow a holding for appellant. * * *

"The Act to regulate commerce preserves existing rights and remedies; the Public Service Commission Law preserves rights but not remedies except as to cases then pending."

See, also, *Graham Ice Co.* v. *Chicago, M. & St. P. Ry. Co.*, 153 Wis. 145, 140 N. W. 1097, construing the Railroad Commission Law of Wisconsin, section 34 of which is the same as section 4398 of our law; in which decision the court said: "It is insisted that section 34, Chapter 362, Laws of 1905, hereinbefore set out, was intended by the legislature to preserve the common-law remedy. It is true that this provision is quite broad, but in view of other parts of the Railroad Commission Law heretofore referred to we are convinced that it was not intended by the legislature to save the common law remedy to the extent of allowing the schedule rate to be attacked in a common-law action. This, we think, appears clearly from the legislation on the subject heretofore referred to. * * *

"In the case at bar there was no application by appellant to the Railroad Commission to change the schedule rates which rates are claimed to be excessive. The schedule rates must, therefore, in the present action be regarded as the lawful rates. * * * Moreover, as before observed, the legislature has the right within constitutional bounds to fix rates and a remedy by action against the Railroad Commission is preserved in favor of any aggrieved party, so the rights of all parties are well guarded under the law."

Our Railroad Commission Law covers the questions of rates, rebates, discriminations, unjust and unreasonable rates, and other matters relating to intrastate shipments, and makes the Railroad Commission the rate-fixing body and the tribunal to first determine the questions of discrimination or unreasonableness of rates instead of the railroad companies or the courts.

Section 4390, Revised Codes, provides that any railroad may bring an action against the Board of Railroad Commissioners in the district court to determine whether or not any rate, classification, *etc.*, fixed or established by the board, is just and reasonable.

Section 4391 gives the same remedy to any shipper and provides that he may bring an action in the district court of the county where the principal office or place of business of such railroad is situated or in any county where any classification, rate, toll, charge, regulation or order of the board is applicable, against the Board of Railroad Commissioners as defendants, to determine whether or not any such classification, rate, *etc.*, is just and reasonable. This section further provides: "That until the final decision in any such action, the classification, rate, toll, charge, regulation or order of the board affecting rates or charges shall be deemed to be final and conclusive; except as herein otherwise provided." And this section further provides: "That in any action, hearing or proceeding in any court, the classifications, rates, tolls, charges, regulations and orders made, fixed and established by said board shall *prima facie* be deemed to be just, reasonable and proper."

The board's orders affecting rates or charges are to be deemed *prima facie* just and reasonable and the court in modifying or setting them aside should exercise its discretion with reserve and caution. (*State ex rel. Board of Railroad Commrs.* v. *District Court*, 53 Mont. 229, 163 Pac. 115.) No provision is found in said Act giving the board power to make rates retroactive, nor is there any express provision in the Act authorizing the board, in the event that it determines under section 4377, or the court determines under section 4384 or 4391, that any rate fixed by the board is unjust or unreasonable, to allow reparation to the shipper for the amount paid during the time such rate as fixed by the board was in force. The rate established by the board being *prima facie* a valid and reasonable rate, presumption as to its validity and reasonableness will be indulged, until its unreasonable or dis-

criminatory character is found by the board itself. Upon change made in the rate by action of the board, this presumption ceases. No cause of action can arise in favor of the shipper until the rate complained of has been modified, by the Railroad Commission upon proper application to it, or by it after judgment of a court of competent jurisdiction in a direct proceeding within the provisions of the statute, determining the rates as fixed by the board to be excessive or unreasonable. The shipper's remedy is to promptly have the rate modified, if unreasonable, by the commission, or to have the reasonableness thereof determined by a court in an action to review the reasonableness of the rates as fixed and established. (*Graham Ice Co.* v. *Chicago, M. & St. P. Ry. Co., supra; Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477, 62 L. Ed. 1221, 38 Sup. Ct. Rep. 550.) Plaintiff's remedy was to apply to the Railroad Commission for a modification of the rate established or for the fixing of a rate in the event no rate had been established, and upon its refusal to grant relief as against an alleged excessive or discriminatory rate, he is entitled to have the matter determined by a court of competent jurisdiction.

The statute differs from the federal Act in that under the latter Act the Interstate Commerce Commission is expressly authorized to order the railroad to pay to the complainant the sum it may find he has been damaged by reason of an unjust rate or discrimination in violation of the Act (36 Stats. 554; U. S. Comp. Stats., sec. 8584), while under the state Act reparation may only be had in a court proceeding based upon the findings and records of the Board of Railroad Commissioners (sec. 4389, Revised Codes).

Under the Interstate Commerce Act, when a person seeks to recover back money which it is claimed he was required to pay in excess of some established interstate rate, or where he seeks to recover damages for discrimination practiced against him, or whenever he attacks the reasonableness of a rate, he is required to present his claim to the Interstate Com-

merce Commission for examination and adjustment before he can bring an action in the courts, notwithstanding the provisions of section 22 of the Act (U. S. Comp. Stats., sec. 8595) that nothing herein "contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." (*Robinson* v. *Baltimore-Ohio R. Co.*, 222 U. S. 506, 56 L. Ed. 288, 32 Sup. Ct. Rep. 114; *Mitchell Coal & Coke Co.* v. *Pennsylvania Ry. Co.*, 230 U. S. 247, 57 L. Ed. 1472, 33 Sup. Ct. Rep. 916; *Howard Supply Co.* v. *Chesapeake & Ohio Ry. Co.* (C. C.), 162 Fed. 188; *Franklin* v. *Philadelphia etc. Ry. Co.* (D. C.), 203 Fed. 134; *United States* v. *Merchants' & M. Traffic Assn.*, 242 U. S. 178, 61 L. Ed. 233, 37 Sup. Ct. Rep. 24.)

The reasoning in the above cases applies with equal force to our statute and to the lack of jurisdiction of the courts to pass upon the reasonableness of the rates and discriminations before the commission has taken action thereon. In other words, before any shipper can recover in the courts damages for excess rates or discriminations, the discrimination or unreasonableness of the rate must first be passed upon by the special tribunal expressly created and authorized by law to handle such matters—the Railroad Commission.

The fact that the Railroad Commission is not authorized, upon determining that a rate is unreasonable or discriminatory, to order reparation, does not prevent a shipper, after the rate has been so determined by the special tribunal created for that express purpose, from maintaining an action in court to recover damages sustained by him as a result of such unreasonable or discriminatory rate. His action is based upon the fact that such rate has been so declared by the proper tribunal, and the court merely determines the amount of damages, if any, sustained.

The cases of *Santa Fe etc. Co.* v. *Atchison etc. Ry. Co.*, 21 N. M. 496, 155 Pac. 1093, and *Murphy* v. *New York Cent. Ry.*, 170 App. Div. 788, 156 N. Y. Supp. 49, cited by plaintiff,

[6] are not in conflict with this theory. A voluntary reduction of a rate by a carrier would not make the prior rate unlawful, unreasonable or discriminatory and the basis for an action for damages.

The supreme court of Wisconsin in an exhaustive opinion has held that a shipper must *first present* his claim to the Railway Commission for determination of the reasonableness of the rate by that board before he can maintain an action in court. (*Graham Ice Co.* v. *Chicago, M. & St. Ry. Co., supra*; see, also, *Hewitt Logging Co.* v. *Northern Pacific Ry. Co., supra; Manufacturers' Ry. Co.* v. *United States*, 246 U. S. 457, 62 L. Ed. 831, 38 Sup. Ct. Rep. 383; *State ex rel. City of Billings* v. *Billings Gas Co.*, 55 Mont. 102, 173 Pac. 799; *Beadle* v. *Kansas City etc. R. Co.*, 51 Kan. 248, 32 Pac. 910; *Winsor Coal Co.* v. *Chicago & A. R. Co.* (C. C.), 52 Fed. 71c; *Chicago, R. I. & P. Ry. Co.* v. *Gist*, 79 Okl. 8, 190 Pac. 878.) Were this not the correct procedure under the statute, great and inevitable confusion and uncertainty would result, as there might arise a multiplicity of suits with varied determinations in the several jurisdictions in the state. In the case of *State ex rel. City of Billings* v. *Billings Gas Co., supra*, this court, speaking through Mr. Justice Holloway, said: "A consideration of the statute [Chap. 52, Laws 1913] leads to the conclusion that in its enactment the legislature intended to provide a comprehensive and uniform system of regulation and control of public utilities, by a specially created tribunal, through which the state itself exercises its sovereign power. Our conclusion is that since 1913 the Public Service Commission has had exclusive jurisdiction over the subject of rate regulation of this company [speaking of the tariffs established by the Board of Railroad Commissioners, *ex-officio* Public Service Commission], that the provisions of the [city] franchise contract fixing rates were superseded by the rates approved by the commission, and that the remedy of the city is by complaint to the commission if the rates now in effect are excessive." This language is applicable to the parent

statute, which establishes a comprehensive system for the government of common carriers within the state.

Therefore: (1) If the rate charged from Evaro and Schley [7] was the rate fixed and established by the Railroad Commission, and if the plaintiff seeks to have the rate so established declared unjust and unreasonable or discriminatory. he should have proceeded under the provisions of section 4391; or (2) if no rate whatever had been established by the board, or the rate fixed was considered excessive then he should have made application to the board, under section 4377, for investigation and determination as to its justness and reasonableness, before he would be in a position to maintain action in the courts; or (3) if the plaintiff's case is predicated upon freight charges made in excess of those fixed and established by the Board of Railroad Commissioners, then the complaint should make such allegation and the action must be shown to have been brought within twelve months from the date of payment, under section 4389. In our opinion, the Railroad Commission Law is controlling, and its provisions cannot be disregarded.

The complaint does not state a cause of action, and the judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, COOPER and HOLLOWAY concur.

Rehearing denied June 20, 1921.

STURM & DRAKE, RESPONDENT, v. ROBERTS ELEVATOR CO., APPELLANT.

(No. 4,347.)

(Submitted April 18, 1921. Decided May 31, 1921.)

[198 Pac. 545.]

Sales—Breach of Contract—Market Value—Evidence — Sufficiency—Substantial Damages Recoverable, When.

Sales—Breach of Contract—Market Value—Evidence—Sufficiency.

1. Where, in an action for breach of contract of sale of hay, the verdict was based on a market value of nineteen dollars per ton, the testimony on that issue ranging from fifteen dollars to twenty-six dollars per ton. the award was not open to the objection that it was not supported by the evidence because no evidence was given placing the value at that exact amount, since substantial evidence showing a valuation in excess of that returned warranted a verdict in the smaller amount.

Same—Substantial Damages—Plaintiff may Recover, When.

2. Under sections 6056 and 6082, Revised Codes, evidence that the market price of the hay purchased by plaintiff, at time and place of delivery, was in excess of the contract price was sufficient to entitle it to substantial damages for defendant's failure to deliver it, even though plaintiff's evidence did not show that it suffered actual damage by having to go into the open market and purchase hay to fill its own contracts or supply its own needs.

Appeal from District Court, Carbon County; A. C. Spencer, Judge.

ACTION by Sturm & Drake, a corporation, against the Roberts Elevator Company. Judgment for the plaintiff and defendant appeals from the judgment and from an order overruling its motion for a new trial. Affirmed.

Mr. Frank P. Whicher, for Appellant, submitted a brief and argued the cause orally.

There is no evidence sufficient to support the verdict for the following reasons: 1. There is no evidence of any market price of hay on January 1, 1917; 2. There is no evidence to support the particular amount which the jury returned in their verdict; 3. There was no evidence of any actual damage to the plaintiff. There is no evidence whatever that there

was ever any established market in Billings, and the witnesses for the plaintiff have based their testimony on hearsay and on what one individual would pay another for hay about January 1, 1917. This does not constitute market value. (26 Cyc. 819; *Martin* v. *Fletcher*, 77 Or. 408, 149 Pac. 895; *McCallister* v. *Sappingfield*, 72 Or. 422, 144 Pac. 432; *Denver N. W. & P. Ry. Co.* v. *Howe*, 49 Colo. 256, 112 Pac. 779.)

Plaintiff contends that, in view of section 6056, Revised Codes, the fact that defendant did not deliver the hay as agreed entitled plaintiff, *ipso facto*, to damages, notwithstanding the fact that plaintiff had suffered no actual damages, had no use for the hay, had not contracted this hay to other parties, and had not been obliged to go into the open market and purchase hay to fill its own contracts or supply its own needs. Is such reasoning sound, or was that ever the legislative intent? I think not. In the cases I have been able to find, there has been some actual damage by the aggrieved party; here there was none, and I therefore contend that the plaintiff was not entitled to recover.

Mr. William Y. Beers, for Respondent, submitted a brief and argued the cause orally.

MR. JUSTICE REYNOLDS delivered the opinion of the court.

Plaintiff brought action against defendant on two causes of action to recover damages for failure to deliver hay pursuant to the terms of two contracts for the sale thereof. Judgment was rendered in favor of plaintiff. Motion for new trial was made and overruled. Defendant appeals from judgment and from order overruling motion.

Several assignments of error are made by defendant, but under the provisions of rule 10, subdivision 3, of this court (53 Mont. xxxv, 167 Pac. x) only one can be considered; *i. e.*, insufficiency of the evidence to justify the verdict.

It is contended that the evidence is insufficient to support the verdict for the following reasons: (1) There is no evidence of any market price of hay on January 1, 1917, being the date specified in the contract for delivery thereof; (2) there is no evidence to support the particular amount which the jury returned in their verdict; (3) there is no evidence of any special damage to the plaintiff.

We are unable to see the force of the first reason above mentioned, for no less than four witnesses testified as to the market price of hay on January 1, 1917, at place specified for delivery.

Under the second reason it is urged that, inasmuch as a [1] mathematical calculation shows that the jury arrived at its verdict on a basis of a market value of $19 per ton for the hay, and there was no evidence given as to that exact valuation, there is no basis for a verdict for the particular amount given. The evidence, however, discloses that testimony was given as to the market value ranging from $15 to $26 per ton and such is also alleged in appellant's brief. So long as there is substantial evidence showing a valuation in excess of that allowed by the jury, then we must hold that the evidence is sufficient to support the verdict in that respect.

It is contended that there is no evidence of actual damage, [2] for the reason that it does not appear that plaintiff suffered actual damage, had any particular use for the hay, had contracted to sell this hay to other parties, or had been obliged to go into the open market and purchase hay to fill its own contracts or supply its own needs. Under the statutes of this state the evidence is sufficient to entitle plaintiff to substantial damages if it discloses that the market price at time and place of delivery was in excess of the contract price. (Rev. Codes, secs. 6056, 6082; *Pritchett* v. *Jenkins*, 52 Mont. 81, 155 Pac. 974.) The same construction has been given by the supreme court of California upon similar statutes. (*Bullard* v. *Stone*, 67 Cal. 477, 8 Pac. 17.)

It is apparent from the foregoing that the evidence was sufficient to support the verdict.

The judgment and order overruling motion for new trial are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES COOPER, HOLLOWAY and GALEN concur.

SANKEY, APPELLANT, *v.* CHICAGO, MILWAUKEE & ST. PAUL RY. CO., RESPONDENT.

(No. 4,345.)

(Submitted April 15, 1921. Decided May 31, 1921.)

[198 Pac. 544.]

Carriers—Railways—Delay in Shipment of Freight—Special Damages—Notice of Urgency of Shipment Necessary.

"General" and "Special" Damages—Definition.

1. "General damages" are such as naturally and necessarily result from the act of which complaint is made; while "special damages" are such as are the natural, but not the necessary, consequences of such act.

Carriers—Delay in Shipment of Freight—Special Damages—Notice to Carrier of Urgency of Shipment Necessary.

2. In order to charge a carrier with special damages arising from delay in the shipment of freight, such as stock feed, notice of the urgency of the shipment must be brought home to the carrier.

Same—Case as Bar.

3. Plaintiff delivered a quantity of stock feed to defendant railway company for shipment to his place of residence, but did not notify it that it was for immediate use, that he was without feed or that the damages claimed by him as having resulted to his stock from failure of prompt shipment might reasonably be expected to flow therefrom. The shipment was not made on the day after receipt because of lack of equipment, nor on the second day, a Sun-

---

1. When shipper is entitled to special damages for delay in shipment, see notes in 128 Am. St. Rep. 588; 131 Am. St. Rep. 169.

Provision in carrier's contract requiring notice of damage or loss as applicable to loss of market value due to delay, see note in 1 A. L. R. 538.

[60 Mont. 242.]

day, no trains being run over the road on Sundays, but was made on the third day. *Held*, that the damages sued for were special, and that, therefore, under the above rule (par. 2) defendant was not liable in the absence of notice of the urgency of the shipment.

Appeals from District Court, Fergus County; Roy E. Ayers, Judge.

ACTION by Elmer Sankey against the Chicago, Milwaukee & St. Paul Railway Company. Verdict for the plaintiff. From an order granting defendant a new trial, plaintiff appeals. Affirmed.

Mr. E. K. Cheadle, for Appellant, submitted a brief, and argued the cause orally.

Messrs. Marshall & Dousman, for Respondent, submitted a brief; *Mr. Chas. J. Dousman* argued the cause orally.

Citing: 10 C. J. 284, 299; 4 R. C. L. 738, 745; *McGray* v. *Baltimore & Ohio R. R. Co.,* 18 W. Va. 361, 41 Am. Rep. 696; *Wall* v. *Northern Pac. Ry. Co.,* 50 Mont. 122; Michie on Carriers, sec. 933; *Wichita Falls & N. W. Ry. Co.* v. *Cawley Co.,* 172 Pac. 70.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought to recover damages alleged to have been suffered by plaintiff as the result of unreasonable delay on the part of the railway company in making delivery of a shipment of feed. The plaintiff alleges that in February, 1917, he was the owner of 128 hogs, which he was feeding at Hilger, Montana; that he procured his feed at Lewistown and shipped it to Hilger over the defendant's railway; that on February 9 he purchased two tons of ground barley at Lewistown, had it delivered to the railway with proper directions to ship it to Hilger; that defendant accepted the shipment and issued its bill of lading. It is further alleged that the shipment was delivered in ample time on the 9th; that it

should have been shipped to its destination on the 10th, but that the railway company negligently delayed the shipment until the 12th; that plaintiff was without feed for his hogs and was unable to procure feed, with the result that his hogs were injured and delayed in their preparation for market and plaintiff was compelled to feed them for six days additional in order to put them in as good condition as they were on the 10th, to plaintiff's damage in the sum of $200.50, for which amount judgment was demanded. All allegations of negligence or damage were denied in the answer.

The trial of the cause resulted in a verdict in favor of plaintiff for the full amount claimed, and judgment was entered accordingly. Later the court sustained defendant's motion for a new trial, and plaintiff appealed from the order.

The evidence introduced by plaintiff follows closely the allegations of his complaint. Nowhere did he testify or contend that he gave the railway notice, or that it had notice, that the feed was intended for immediate use, that he was without feed, or that the damages claimed might reasonably be expected to result from the delay which ensued. The evidence discloses, on the contrary, that the railway company did not have such notice. It also appears that the 11th of February was Sunday; that the railway company did not run any train on its Hilger branch on Sundays; that it forwarded the shipment on Monday, the 12th, by the second train leaving Lewistown after the shipment was received, and that lack of equipment prevented the shipment on the 10th.

All of the damages claimed by plaintiff are special dam-
[1] ages. General damages are such as naturally and necessarily result from the act of which complaint is made. Special damages are such as are the natural, but not the necessary, consequences of the act of which complaint is made. (*Root* v. *Butte, A. & Pac. Ry. Co.*, 20 Mont. 354, 51 Pac. 155; *O'Brien* v. *Quinn*, 35 Mont. 441, 90 Pac. 166.)

The authorities are practically uniform in holding that,
[2, 3] in order to charge a carrier with special damages

arising from delay in the shipment of freight such as is involved here, notice of the urgency of the shipment must be brought home to the carrier. The decided cases are too numerous to be cited. Reference to many of them will be found in Merriam on Claims between Shippers and Carriers, section 404. In 10 C. J., section 433, page 302, the rule is stated concisely as follows: "One who seeks to recover special damages for breach of a contract of carriage must show that such damages were within the contemplation of both parties to the contract; otherwise he can recover only such damages as in the usual course of things flow from the breach. And he must show notice to the carrier at the time of the shipment of special circumstances from which said damages might arise." (See, also, 4 R. C. L., pp. 936–938; *Daube & Kapp* v. *Chicago, R. I. & T. Ry. Co.*, 39 Tex. Civ. App. 24, 86 S. W. 797.)

Section 6065, Revised Codes, which determines the general damages recoverable in an action of this character, provides: "The detriment caused by a carrier's delay in the delivery of freight is deemed to be in the intrinsic value of the freight during the delay, and also the depreciation, if any, in the market value thereof, otherwise than by reason of a depreciation in its intrinsic value, at the place where it ought to have been delivered, and between the day at which it ought to have been delivered and the day of its actual delivery."

In the absence of some showing that the railway company had notice of the urgency of this shipment, the plaintiff was not entitled to recover special damages, and the court did not err in granting a new trial.

The order is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, COOPER and GALEN concur.

CLARY, ADMINISTRATOR, APPELLANT, *v.* FLEMING, RESPONDENT.

(No. 4,371.)

(Submitted April 15, 1921. Decided May 31, 1921.)

[198 Pac. 546.]

Ejectment—Resulting Trusts—Husband and Wife—Conveyances—Gifts—Presumptions—Divorce — Collusion — Public Policy.

Appeal and Error—Assignments of Error—Rules of Supreme Court—Briefs.

1. Where errors are assigned involving the rulings of the trial court upon objections to evidence, appellant must, under subdivision 3b of Rule X of the supreme court, point out in his brief the specific evidence objected to, and give the page or pages of the transcript upon which such rulings may be found.

Husband and Wife—Conveyances—Divorce—Collusion—Public Policy.

2. An agreement between husband and wife, whereby the latter promised to convey a lot to the former in consideration of his failure to fight a divorce action instituted by her, was collusive and void as against public policy.

Same—Property Settlements—Must be in Writing.

3. An agreement between husband and wife providing for a property settlement between them must, under section 3695, Revised Codes, be in writing.

Real Property—Resulting Trusts—Conveyances Between Husband and Wife—Gifts—Presumptions.

4. The rule declared by section 4538, Revised Codes, that where real property is conveyed to one person and the consideration therefor is paid by another, a trust is presumed to result in favor of the person paying the consideration, *held*, subject to the exception that where the property is purchased by one with his own money and the title is placed by him in another to whom he stands in a confidential relation, such as husband, wife, parent, child, *etc.*, the presumption, rebuttable in character, is that the conveyance is made as a gift.

Same—Resulting Trusts—Conveyances Between Husband and Wife—Character of Evidence Required.

5. Where it is sought to establish a resulting trust by reason of a conveyance made by or on behalf of a husband to his wife, the evidence establishing such trust must be clear, convincing and practically free from doubt, especially so where the wife is dead and the husband must establish his case by his own testimony as to oral conversations between himself and deceased.

Same—Resulting Trusts—Equity—Laches.

6. In an action in ejectment in which defendant sought to establish a resulting trust in property conveyed to his wife, the consideration for which was paid by him, *held*, that by waiting ten years before asserting his claim, the wife in the interim having secured a divorce,

[60 Mont. 246.]

remarried and died, she in her lifetime paying the taxes, rented and in every way treated it as her own, he was guilty of such laches as precluded his right to appeal to a court of equity for relief.

Appeals from District Court, Fergus County; Roy E. Ayers, Judge.

ACTION by C. M. Clary, as administrator of the estate of Margaret Wolf, deceased, against A. L. Fleming. From a judgment for defendant, and from an order overruling his motion for new trial, plaintiff appeals. Reversed and remanded.

Mr. Charles J. Marshall and ***Mr. C. W. Buntin,*** for Appellant, submitted a brief; ***Mr. Charles J. Dousman,*** of Counsel, argued the cause orally.

Messrs. Cheadle & Cheadle, for Respondent, submitted a brief; ***Mr. E. K. Cheadle*** argued the cause orally.

MR. JUSTICE REYNOLDS delivered the opinion of the court.

This action was brought by plaintiff against defendant for the purpose of ejecting defendant from a certain lot in the original town site of Moore and quieting title in plaintiff thereto. The case was tried to the court without a jury. Findings were made in favor of defendant, and judgment followed. Motion for new trial was made and overruled. Plaintiff appeals from the judgment and order overruling motion.

Margaret Wolf, deceased, was formerly Margaret Fleming, and the wife of A. D. Fleming, the defendant. In May, 1905, a deed was made by Montana Town-Site Company to Margaret Fleming conveying the premises. As an affirmative defense the answer alleges that defendant paid certain sums of money on the contract for the purchase of the lot, that no consideration was ever paid by Margaret Fleming for the execution and delivery of the deed, and that immediately prior thereto it was agreed between defendant and his wife that

he should allow the deed to run to her as grantee in consideration of her promise that she would convey the lot to him at any time upon request. The answer also alleges that she obtained a divorce from him in 1909, at which time, as a settlement of their property interests, she promised that she would convey to him the lot after entry of decree of divorce, and that in reliance upon her promise he made no appearance in the divorce proceedings, and no written agreement was made respecting their property interests. These allegations are traversed by reply. The proofs, however, fail to show what agreement was made between defendant and his wife at the time of or prior to the execution and delivery of the deed to her, or even that any agreement was made. Defendant testified that immediately prior to the granting of the divorce she promised him that, if he would not fight the divorce, she would convey to him the premises, together with a half interest in other property held in her name. He also testified that he made demand upon her several times for a conveyance of the lot, and that she put him off from time to time with promises that she would make the conveyance. After the divorce, she married one F. E. Wolf.

Margaret Fleming did not record the deed immediately after receiving it, but held it until March, 1915. On the 14th of March, 1913, defendant, learning that her deed had not been recorded and assuming that it had been lost, procured another deed from Montana Town-Site Company, which deed was issued as a duplicate of the former one, but in the name of defendant. This deed was recorded March 15, 1913. On March 25, 1913, the original deed to Margaret Fleming was recorded. On the 21st of May, 1915, Margaret Wolf, formerly Margaret Fleming, died, and plaintiff was appointed administrator of her estate. By reason of the recording of the deed to defendant, this action was brought.

It is the contention of defendant that, under the facts stated, Margaret Fleming took the title to the premises in trust, and that he is entitled to have the title quieted in himself.

[60 Mont. 246.]

Twelve errors are assigned, but many of them are not entitled to consideration. These insufficient assignments of error [1] involve the rulings of the court upon objections to the introduction of evidence, but each of them fails to point out any specific evidence objected to, or the page or pages of the transcript upon which such rulings can be found. It is altogether too much to expect that this court will go through an entire transcript and pick out rulings that it may conclude that appellant desires to attack by such assignments. The rule requires: "When error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected." (Rule 10, subd. 3b, 53 Mont. xxxvi, 167 Pac. x.) Reference should also be made to the page of the transcript where the objectionable ruling may be found.

One of the errors assigned is that the court erred in finding that the consideration for the lot was paid by defendant, and that the property was held in trust by Margaret Fleming for defendant. The case may be disposed of upon this assignment of error, and therefore it will be unnecessary to consider any of the other alleged errors.

The alleged agreement whereby Margaret Fleming promised [2] to convey to defendant the lot in consideration of his failure to fight the divorce action was clearly collusion and against public policy, and was therefore void. Even if it be deemed an [3] agreement for a property settlement such as is permissible under the statute, it is likewise void because not in writing. (Rev. Codes, sec. 3695.) Thus no further consideration need then be given to the legal effect of this agreement.

The vital question in the case is whether or not there was [4] created a resulting trust in favor of defendant by reason of the fact that he paid the purchase price of the lot and the expense of improving the same, while the title was taken in the name of his wife. We do not think that the answer sets forth a resulting trust under this theory, but nevertheless will dispose of the question on the merits. Defendant relies upon sec-

tion 4538 of the Revised Codes, which reads as follows: "When a transfer of real property is made to one person, and the consideration thereof is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made." This statutory provision is merely a restatement of the common law; for it has been held from time immemorial that, as a general rule, if one person takes to himself the title of property purchased with the money of another, he takes it charged with a trust in favor of the one who furnished in consideration. This provision is intended to reach those cases whereby one party has violated the confidence or trust reposed in him by another and in buying property has taken title to himself, or wrongfully retained title, when, as a matter of fact, he had no interest therein. It is intended as a protection to the one who makes the actual investment against any fraudulent dealing on the part of one who may be acting for him in the matter. There are, however, exceptions to the rule as stated. If the property is purchased by one with his own money, and the title is placed by him in another to whom he stands in a confidential relation, such as husband, wife, parent, child or such other relation that one may naturally have a claim upon the bounty of the other, then the presumption is that the conveyance is made as a gift. (*Taylor* v. *Miles*, 19 Or. 550, 25 Pac. 143; *Hamilton* v. *Hubbard*, 134 Cal. 603, 51 Am. Dec. note 754, 755, 65 Pac. 321, 66 Pac. 860; *Whitten* v. *Whitten*, 70 W. Va. 422, Ann. Cas. 1915D, 647, 74 S. E. 237, 39 L. R. A. (n. s.) 1026.) See, also, numerous citations in *Lafayette Street Church Society of Buffalo* v. *Norton*, 202 N. Y. 379, 39 L. R. A. (n. s.) 906, 95 N. E. 819. The supreme court of Oregon, in the case of *Taylor* v. *Miles*, *supra*, considering a similar question, uses this language: "But the presumption that the party paying for the property intended it for his own benefit applies only when the transaction is between strangers, where there is no natural or legal obligation resting on the purchaser to pay the consideration for another. When the purchaser takes the conveyance in the name of his wife, the

sale [rule?] is reversed, and equity raises the presumption that the purchase and conveyance was intended to be an advancement or gift. 'Whenever,' says Mr. Pomeroy, 'the real purchaser—the one who pays the price—is under a legal or even a moral obligation to maintain the person in whose name the purchase is made, equity raises the presumption that the purchase is intended as an advancement or gift, and no trust results.' (2 Pom. Eq. Jur., par. 1039.)"

The supreme court of California, from which state our statute was taken, in the case of *Hamilton* v. *Hubbard, supra,* has given a similar construction to the statute in the following language: "Ordinarily indeed, where a conveyance is made to one, and the consideration paid by another, a trust is 'presumed' in favor of the latter. (Civ. Code, sec. 853.) But this presumption arises only in transactions between 'strangers to each other' (1 Perry on Trusts, sec. 126), and is not indulged where the conveyance is to the 'wife or child, or other person, for whom (the person paying the consideration) is under some natural, moral, or legal obligation to provide.' In such cases the presumption is 'that the purchase and conveyance were intended to be an advancement for the nominal purchaser.' (1 Perry on Trusts, sec. 143; Hill on Trustees, 97, and note.) The transaction was therefore a gift to Mrs. Hamilton, and, under the express provisions of the Code, her separate property. (Civ. Code, sec. 162.)" There are some California cases holding that in certain instances this statute is applicable to dealings between husband and wife, parent and child, but in each of those cases there appears a breach of confidence or trust whereby a trust *ex maleficio* results; but we are unable to find any case in which a resulting trust is presumed when a husband voluntarily takes the title in the name of his wife and there has been no breach of faith on her part.

While in such cases the presumption is that the conveyance was intended as a gift, yet it is a rebuttable presumption. In this case, however, there is nothing to rebut this presumption, as the record is entirely devoid of any evidence whatever show-

ing that there was any understanding or agreement between defendant and his wife that the conveyance should not be deemed a gift.

In any case in which it is sought to establish a resulting [5] trust by reason of a conveyance made by or in behalf of a husband to his wife, the evidence establishing such trust relationship should be clear and convincing. It should be practically free from doubt. (10 L. R. A. 401, and notes; *Parker* v. *Newitt*, 18 Or. 274, 23 Pac. 246; *Coe* v. *Coe*, 75 Or. 145, 145 Pac. 674.) This principle is especially applicable where the defendant must establish his case by his own testimony as to oral conversations between himself and his former wife, whose lips are now sealed by death. From our view of the facts of this case, we are not satisfied that defendant's testimony is entitled to full credence. It must be remembered that the deed was made to defendant's wife in 1905, and in 1909 a complete separation took place resulting in an absolute divorce. No articles of separation covering a settlement of property were executed as is customary in property settlements between man and wife who are about to be permanently separated. After [6] the divorce she married another man and continued to live as his wife until 1915, when she died. At no time within the ten years after the delivery to her of the deed, or the six years ensuing after the divorce, did he take any action to enforce any claim against this property. It is true that he testifies that he made several demands upon her for a conveyance of it, but we cannot know whether or not she would admit that he made such demands if she were able to speak, and there is no proof of any kind in corroboration of his story. From the time the deed was delivered to her she took possession of and assumed dominion over the property, paid the taxes on it, rented it, and in every respect treated it as her own, and did nothing in any way acknowledging any interest of defendant in the property, save her possible promise that she would convey it to him, as testified to by him. These circumstances, in our mind, present a condition of laches on the part of defendant that is

inexcusable, if he was in her lifetime claiming in good faith that he was entitled to this property. The mere fact that he allowed her to retain the legal title and the actual dominion of it for her lifetime without substantial question, and then, upon her death, asserted his claim when he knew that it was impossible for her to contradict any statement that he might make, bears the mark of bad faith. This court has considered a case somewhat similar in principle and expressed itself very emphatically as to the effect of such laches. (*Riley* v. *Blacker*, 51 Mont. 364, 152 Pac. 758.) The court in the case cited, speaking through Mr. Justice Sanner, used this language: "Laches, considered as a bar independent of the statute of limitations, is a concept of equity; it means negligence in the assertion of a right; it is the practical application of the maxim, 'Equity aids only the vigilant'; and it exists when there has been unexplained delay of such duration or character as to render the enforcement of the asserted right inequitable. Therefore has it often been held by this court that, while a mere delay short of the period of the statute of limitations does not of itself raise the presumption of laches (*Wright* v. *Brooks*, 47 Mont. 99, 130 Pac. 968; *Parchen* v. *Chessman*, 49 Mont. 326, Ann. Cas. 1916A, 681, 142 Pac. 631, 146 Pac. 469; *Brundy* v. *Canby*, 50 Mont. 454, 148 Pac. 315), yet 'good faith and reasonable diligence only can call into activity the powers of a court of equity, and, independently of the period fixed by the statute of limitations, stale demands will not be entertained or relief granted to one who has slept upon his rights. Considerations of public policy and the difficulty of doing justice between the parties are sufficient to warrant a court of equity in refusing to institute an investigation, where the lapse of time in the assertion of the claim is such as to show inexcusable neglect on the part of the plaintiff, no matter how apparently just his claim may be; and this is particularly so where the relations of the parties have been materially altered in the meantime.' (*Kavanaugh* v. *Flavin*, 35 Mont. 133, 88 Pac. 764; *Streicher* v. *Murray*, 36 Mont. 45, 92 Pac. 36; *Brundy* v. *Can-*

by, supra.) What constitutes a material change of condition has been the subject of much judicial discussion and some judicial dissension; but, whatever doubt there may be as to the other circumstances, it never has been questioned, to our knowledge, that the death of one of the parties to the transaction is such a change."

Defendant has so slept on his rights, if he ever had any, that his contention utterly fails to appeal to the sense of justice and equity of this court.

The judgment and order overruling motion for a new trial are reversed, and the cause is remanded to the district court, with directions to enter judgment for plaintiff pursuant to the prayer of the complaint.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES COOPER, HOLLOWAY and GALEN concur.

PIONEER MINING CO., APPELLANT, *v.* BANNACK GOLD MINING CO., RESPONDENT.

(No. 4,384.)

(Submitted April 23, 1921. Decided June 1, 1921.)

[198 Pac. 748.]

Ejectment—Mines and Mining Claims—Easements — Waters and Water Rights—Flumes—Change of Location and Use—Appeal and Error—Nominal Damages.

Mines and Mining Claims—Flumes—Implied Easements.

1. The owner of mining claims and mill sites conveyed a certain portion of them to plaintiff's predecessor, reserving in itself the lumber and material in a flume connecting with a quartz-mill on the portion not sold; also a right of way for a road thereto, the right to discharge mill tailings on the portion conveyed, *etc.* The remainder of the property was sold to defendant's predecessor in interest. *Held,*

---

1. On application of rules to easements in water and watercourses, see notes in 26 L. R. A. (n. s.) 356; L. R. A. 1915C, 351.

[60 Mont. 254.]

that plaintiff acquired title with full knowledge of the reservations and that water conveyed through the flume was necessary to operate the mill, and that therefore, while the deed did not expressly reserve the right to so convey the water, he took title to the land burdened with an implied easement in defendant to use it for that purpose.

Easements—Presumptions.

2. As respects easements, the parties to a contract to sale of land are presumed to have contracted with reference to the conditions of the property at the time of sale, provided the marks are open and visible.

Implied Easements—Intent.

3. An implied easement rests upon implied intent gathered from the circumstances surrounding the conveyance.

Easements—When Apparent.

4. An easement is apparent when it may be discovered upon reasonable inspection.

Mines and Mining Claims—Flumes—Implied Easements.

5. An easement to conduct water to a quartz-mill necessarily implies the right to conduct it from the mill.

Same—Waters and Water Rights—Flumes—Change of Location and Use of Water.

6. Under section 4842, Revised Codes, the location of a flume maintained over the land of another, as well as the use of the water flowing through it, may be changed, provided the change adds no new burdens to the servient estate or causes additional damage thereto.

Real Property—Ouster—Intent.

7. An entry by one upon the land of another is an ouster of the legal possession arising from the title, or not, according to the intention with which it is done.

Ejectment—Right to Nominal Damages—Insufficient to Warrant Reversal of Judgment.

8. Where, in an action in ejectment, the property involved consisting of mining claims, the only meritorious claim for damages was based upon an encroachment of plaintiff's land by the erection of a toilet erected for temporary use, the injury complained of was too small to be a basis for the computation of damages, unless merely nominal, and therefore insufficient to warrant reversal of the judgment otherwise proper.

Appeals from District Court, Beaverhead County; Joseph C. Smith, Judge.

ACTION by the Pioneer Mining Company against the Bannack Gold Mining Company. From a judgment for defendant and from order denying a motion for a new trial, plaintiff appeals. Affirmed.

---

3. Grant of easement by implication, see notes in 23 **Am. Rep.** 446; 122 **Am. St. Rep.** 206; 67 **L. R. A.** 386.

Mr. H. C. Hopkins, for Appellant, submitted a brief, and argued the cause orally.

At the time appellant's title was conveyed from the ancestor, the ancestor owned all the realty of appellant and respondent, but not the mill or its machinery or appurtenances. At that time there was a flume connecting the end of the North Side Ditch (which end was not on appellant's ground) with the mill (which was not on appellant's ground). The flume extended entirely across appellant's land, and was not in use at the date of appellant's deed. The mill had been used but was not then being worked. There was no easement in the ancestor for the use of the flume over the property it conveyed to appellant, for no one can own an easement in his own lands. (Rev. Codes, sec. 4511; *Smith* v. *Denniff*, 24 Mont. 20, 81 Am. St. Rep. 408, 50 L. R. A. 741, 60 Pac. 398.)

The ancestor, in severing the large estate, conveyed to appellant's predecessors what may be termed the "servient" tenement or ground; it did not first convey the mill and the ground on which it stood. Had this been the case a different measure of law would apply; but here, the ancestor first conveyed land over which a third party had a flume, whether under a contract with the ancestor or by lease, or by mere license, or under agreement with the ancestor to remove same upon the happening of some contingency, we are left absolutely in the dark. The lumber and material in the flume was reserved to the third party, but the flume was destroyed by the purchaser after the purchase, and remained destroyed for some seventeen or eighteen years, when in April, 1916, the respondent attempts to revive or bring to life such right, without showing what it is. In order that respondent may claim this flume right, such right must have been appurtenant to the land at the time of the conveyance to respondent's predecessors, and the burden of showing such to have been the fact is upon the respondent. (*Custer Cons. Mines Co.* v. *City of Helena*, 52 Mont. 36, 156 Pac. 1090; *Smith* v. *Denniff, supra.*) Respondent has failed to prove this.

Section 4429, Revised Codes of Montana, states when things are to be deemed appurtenant; but it is the nature and use of the thing which makes it appurtenant or not. The proof shows the third party did, under some arrangement, make use of the flume from the end of the North Side Ditch to the mill, and of the waters of the North Side Ditch, but fails to show an easement in the third person, or in respondent or its predecessors. (*Babcock* v. *Gregg*, 55 Mont. 317, 178 Pac. 286.) Had the mill been annexed to the land on which it stood, and had it belonged to the ancestor, then, with the ownership of the North Side Ditch, the land and the mill in the same person, upon a severance and sale of the *quasi* "servient" tenement, the statutes would apply, and the sale to appellant's predecessors would undoubtedly have left the appellant's land impressed with an easement for the flume and tail-race as it existed. There would have been an implied reservation of an easement. But in this case the matter stands upon principle in a position very different from ordinary implied grants. Under the conditions as they existed, if the ancestor had intended to reserve any right from the tenement granted, it was his duty to reserve it expressly in the grant. (14 Cyc., p. 1171, and notes 20, 21; 3 Farnham on Waters, sec. 832; *Burr* v. *Mills*, 21 Wend. (N. Y.), 290; *Suffield* v. *Brown*, 33 L. J. Ch. (n. s.) 249; *Wheeldon* v. *Burrows*, L. R. 12 Ch. Div. 31; *De Rochemont* v. *Boston & M. R. R. Co.*, 64 N. H. 500, 15 Atl. 131; *Preble* v. *Reed*, 17 Me. 169; *White* v. *Chapin*, 97 Mass. 101; *Meredith* v. *Frank*, 56 Ohio St. 479, 47 N. E. 656, 9 R. C. L., sec. 28, p. 765, and note 18; Ann. Cas. 1913C, 1104, 1110.)

Even should the court determine that there was an implied reservation of an easement for the flume, and even for a tail-race, still the easement would be only that which existed at the date of the grant to appellant's predecessors May 28, 1897. It could be no different or greater than it then was. The extent of the user could not be increased by respondent. And from respondent's own uncontradicted evidence such a change, enlargement and misuser was made that the easement, if any, was

abandoned by the use made, and appellant was entitled to the premises. (Rev. Codes, secs. 4512, 4618; 9 R. C. L., pp. 700, 793; *McKinney* v. *Pennsylvania R. R. Co.*, 222 Pa. 48, 21 L. R. A. (n. s.) 1002, 70 Atl. 946; 15 Cyc. 25, 26, and note 19; *Babcock* v. *Gregg*, 55 Mont. 317, 178 Pac. 284.)

Mr. E. B. Howell and *Messrs. Lew. L. & E. J. Callaway*, for Respondent, submitted a brief; *Mr. Lew. L. Callaway* argued the cause orally.

The common predecessor of the parties clearly reserved to itself the right to work the ores from its veins of quartz through the Golden Leaf mill.

It clearly was the intention of the grantor to reserve to itself, and it did reserve by necessary implication, the right to work its mill. It was a mill run by water-power, and it must be assumed that it intended to continue to run it by the only sort of power it was possible to run it with—water; the only way to get the water from the North Side Ditch to the mill was by a flume. All doubts which may arise in the construction of the grant in so far as the reservations are concerned are to be resolved in favor of the grantor. "A reservation must be so construed as to give a practical right and not so as to render it worthless or unavailing. (18 C. J., Deeds, 363, note 34.) "A grant carries by implication as incidental thereto whatever is necessary to the reasonable enjoyment of the thing granted, and this applies to a reservation." (*Id.*, note 35.)

In *Bushnell* v. *Proprietors of Ore Bed*, 31 Conn. 150, 3 Morr. Min. Rep. 258, the plaintiff had conveyed to the defendants the right to discharge dirt from their ore washing upon his meadow lot. The tailings accumulated and spread so as to flow down upon the plaintiff's pasture lot just below the meadow lot. The court held that the damage was an incident to the grant and defendants were not liable; that the grantor is presumed to convey everything incidental to the enjoyment of the grant so far as may be in his power to yield. (*Forbush* v. *Lombard*, 13 Met. (Mass.) 109; *Marshal* v. *Niles*, 8 Conn. 369;

[60 Mont. 254.]

St. Anthony Falls Water Power Co. v. *Minneapolis*, 41 Minn. 270, 43 N. W. 56; *Fiske* v. *Brayman*, 21 R. I. 195, 42 Atl. 878; *Carroll's Lessee* v. *Granite Mfg. Co.*, 11 Md. 399; *Consolidated Ice Co.* v. *New York*, 65 N. Y. Supp. 912; 13 Cyc. 676; *Elsea* v. *Adkins*, 164 Ind. 580, 108 Am. St. Rep. 320, 74 N. E. 242; *Reynolds* v. *Union Sav. Bank*, 155 Iowa, 519, 49 L. R. A. (n. s.) 194, 136 N. W. 529.)

"An instrument creating a servitude need not mention accessory rights, since they pass as incidents to the contract." (14 Cyc. 1160, note 49; *Patout* v. *Lewis*, 51 La. Ann. 210, 25 South. 134.) Nor need it mention appurtenances. (*Ropps* v. *Barker*, 4 Pick. (Mass.) 239.) The right to maintain a drainage ditch may pass as an appurtenance. (*Fayter* v. *North*, 30 Utah, 156, 6 L. R. A. (n. s.) 410, 83 Pac. 742.)

The law is that if the dominant tenement is so altered as to change the nature of the easement the right is extinguished; but the alteration must be material and not of a trifling character only, and if the use is the same in substance though not in quality, the easement is not destroyed. Such is clearly the intendment of section 4512 of our Codes. The terms of the grant, and the nature of the enjoyment by which it was acquired, contemplate the very result which we have here; and for the same reason section 4618 gives the appellant no aid. Ruling Case Law is cited by appellant, but we find in that work under the head of easements, the following: "The cases recognized the doctrine that a material and injurious change may not be made, but that an immaterial change does not affect the easement." (19 R. C. L., "Easements," sec. 47, note 19.) "A slight and immaterial change, however, is not objectionable." (*Id.*, sec. 52, note 6; *Tallon* v. *Mayor of Hoboken*, 60 N. J. L. 212, 37 Atl. 895; *Wallis* v. *First Nat. Bank*, 155 Wis. 306, 143 N. W. 670; *McFarland* v. *Park Woolen Mills*, 113 Ga. 1072, 39 S. E. 405; *Burris* v. *People's Ditch Co.*, 104 Cal. 248, 37 Pac. 922; *Cram* v. *Chase*, 35 R. I. 98, 43 L. R. A. (n. s.) 824, 85 Atl. 642; *Parsons* v. *New York, N. H. & H. Ry. Co.*, 216 Mass. 269, 103 N. E. 693; *Greunson* v. *Healy*, 100 Pa. 42;

Gillespie v. *Weinberg*, 148 N. Y. 238, 42 N. E. 676; *Abbott* v. *Butler*, 59 N. H. 317; *Shreve* v. *Mathis*, 63 N. J. Eq. 170, 52 Atl. 234.)

MR. CHIEF COMMISSIONER POORMAN prepared the opinion for the court.

This is an action in ejectment. Verdict and judgment for defendant. Plaintiff appeals from the judgment and from an order overruling its motion for a new trial. The acts of defendant complained of appear in the statement.

At the times mentioned in the complaint plaintiff was the owner of certain mill sites and placer claims, or parts thereof, described in the complaint, including the Junction mill site, the French mill site, and the South Side placer. The defendant owned certain lands northwest of and adjoining the lands of plaintiff. At one time the Western Mine Enterprise Company owned all of the lands involved herein, and in 1897 it conveyed by deed to A. F. Graeter and others all or a part of the Junction mill site, the French mill site, and the South Side placer, with other lands. This deed contains the following reservations: "Excepting the lumber and material in the water flume connecting with the so-called Golden Leaf mill, and in the ore-bins and mill tram thereon, said lumber and material being the property of the Bannack Mining & Milling Company, and excepting and reserving to the said party of the first part the right of a roadway for wagons across the said premises to connect with the Golden Leaf mill; the right to discharge mill tailings upon the said premises from the operation of the said mill, and excepting and reserving any and all veins or lodes of quartz which may be found or which may be within or upon the said premises and the right to work and explore the same." The grantees named in this deed in 1898 conveyed their interest to plaintiff. In 1906 the Western Mine Enterprise Company sold and conveyed all of its property which it had not theretofore sold to Graeter and his associates to Carlton H. Hand, who in turn sold it to the defendant

company. The predecessor in interest of the Western Enterprise Company was the Golden Leaf Mining Company, the then owner of the Golden Leaf mill, which was operated by water-power conveyed to it through the North Side Ditch, and the flume, extending across a part of the lands conveyed to the plaintiff company. At the time of the execution of the deed to Graeter and others, the Western Mine Enterprise Company owned the Golden Leaf mill and the land on which the same was situated, but did not own the mill machinery. That was owned by a subsidiary company known as the Bannack Mining & Milling Company, which was the operating company of the mill. The rights of this latter company subsequently passed to the defendant herein.

The defendant maintains that at the time of the sale to Graeter the flume and mill were in a workable condition, the witness stating: "We had been using the mill and conveying the water from the North Side Ditch down to the mill. At the exact time of the conveyance to Graeter * * * they would be in such a condition that a few dollars would have put them into operating condition. It would be just the ordinary work that would have to be done on a flume if you were to shut down in the fall, say, and start work in the spring." This condition of the mill and flume is disputed by the plaintiff.

The defendant further maintains that the plaintiff, in dredging its ground, destroyed the flume and so changed the surface of the ground that it was impossible to ascertain the exact location of the original flume. Plaintiff also disputes this fact, and maintains that there was no flume there except in certain places.

Subsequently the Bannack Mining & Milling Company rebuilt the flume and, as maintained by defendant, on the same line of the original flume, as nearly as could be then ascertained. The flume so built was of practically the same size as the original flume. The plaintiff, however, claims that the new flume was in a new location and was larger than the old flume.

Some time prior to the trial, the plaintiff caused its ground to be surveyed, and according to that survey, as appears from the evidence, the building designated as a retort building projected on to plaintiff's land a distance of 3.35 feet in width and twenty-four feet in length. There was also a structure designated as a penstock, or standpipe, which extended across the line on to plaintiff's ground a distance of five feet, also a pump-house seven feet three inches by nine feet, a toilet building seven feet three inches square, a tail-race 93.5 feet long, twelve feet wide, and ten feet deep, but according to the survey made by the defendant, which was also in evidence, the retort building was not on the plaintiff's land, and the building known as the pump-house was entirely abandoned and removed by the defendant before the commencement of the action; that it was only a small house; that the pump was used to pump water in mixing cement for the foundation of the mill; that the toilet was a mere temporary structure set upon the gravel, without a pit or foundation. The flume referred to in the plaintiff's evidence was also upon the plaintiff's ground. It was also maintained by defendant that this flume, tail-race, and standpipe are necessary to the operation of the mill. All these matters, in so far as there was a conflict of evidence, were determined by the verdict of the jury. The only question then remaining here is the question of law relating to the right of the defendant to maintain the flume and the tail-race. The standpipe or penstock, according to the testimony in this case, was a necessary part of the flume, being required to enable the defendant to utilize the water with which to operate the mill.

At the time plaintiff acquired title to this land, it was [1] charged with the knowledge of the existence of this mill and of the fact that same was operated by water-power conveyed to it through the North Side Ditch and the flume, for the ditch and the flume extended across the land conveyed to plaintiff, and the deed to the plaintiff's immediate grantor refers to the "water flume connecting with the Golden Leaf

mill," reserving the material thereon, with the statement that the same belonged to the Bannack Mining & Milling Company. The deed also reserves a right to a roadway for wagons to the "Golden Leaf mill," also "the right to discharge tailings upon the said premises from the operations of said mill." The Western Mine Enterprise Company was at the time of the conveyance to plaintiff's immediate grantors the owner of the mill, which was operated only by this water-power. While the deed did not expressly reserve the right to convey water across the land conveyed to the plaintiff's grantors, or to erect and maintain a flume thereon, yet there is the clear implication that the company did not intend to abandon its mill or the operation thereof, else why would it reserve the right to discharge mill tailings upon the premises conveyed "from the operation of the said mill"?

It is true, as maintained by appellant, that no easement exists so long as there is a unity of ownership, because the owner of the whole may at any time rearrange the qualities of the several parts, but the moment a severance occurs, by the sale of a part, the right of the owner to redistribute the properties of the respective portions ceases; and easements or [2] servitudes may thus be created or reserved. The parties are presumed to contract with reference to the condition of the property at the time of the sale, provided the marks are open and visible. (*Lampman* v. *Milks*, 21 N. Y. 505; *Martin* v. *Murphy*, 221 Ill. 632, 77 N. E. 1126; *Oland* v. *Mackintosh*, 45 Nova Scotia, 13; 19 C. J. 920.)

It is also quite generally held that, where there is a grant of land, with full covenants of warranty, without express reservations of easements, there can be no easement by implication, unless the easement is strictly one of necessity. (19 C. J. 920.)

"In a sense no easement or *quasi* easement can well be absolutely necessary to any possible enjoyment of property. The most that can be required is that it be, in addition to being apparent and continuous, essential to use and enjoyment of the premises as permanently improved at the time of the con-

veyance of the servient estate. And this appears to be what is meant by the term 'strict necessity,' in defining easement reserved by implication." (19 C. J. 920, note 75, Div. A.)

"The term 'necessity' is to be understood as meaning that there could be no other reasonable mode of enjoying the dominant tenement without the easement." (*Starrett* v. *Baudler,* 181 Iowa, 965, 980, L. R. A. 1918B, 528, 165 N. W. 216; 19 C. J., *supra.*)

"The word 'necessary' is not to be limited to absolute physical necessity; and a way over land of the grantor in a deed may pass as appurtenant to the land granted, although there are no insuperable physical obstacles to prevent access by another way, if such other way cannot be made without unreasonable labor and expense; and in determining this question, a jury may consider the comparative value of the land and the probable cost of such a way." (*Pettingill* v. *Porter,* 8 Allen (90 Mass.), 1, 85 Am. Dec. 671; *Carbrey* v. *Willis,* 7 Allen (Mass.), 364, 83 Am. Dec. 68, 694.)

Implied easements rest upon implied intent gathered from [3] the circumstances surrounding the conveyance. (*Wells* v. *Garbutt,* 132 N. Y. 430, 437, 30 N. E. 978.)

An easement is apparent when it may be discovered upon [4] reasonable inspection. (*Lampman* v. *Milks, supra.*)

The Massachusetts court construes the law there strictly against implied easements, and it may be true, as stated by the New York court in *Taylor* v. *Millard,* 118 N. Y. 244, 6 L. R. A. 667, 23 N. E. 376, also Tiffany on Real Property, 2d ed. 1920, section 380, that it is good policy to discourage easements by implication, but this doctrine cannot be carried to the extent of depriving a party of his rights clearly established by the evidence in the particular case. It is also apparent, and as held by the authorities above cited, that a distinction is to be made between the easement reserved for the benefit of the estate granted and for the benefit of a separate estate. A quite thorough discussion of this subject may be found in

Elliott v. *Rhett,* 5 Rich. (S. C.) 405, 57 Am. Dec. 750, and note thereto; also 29 C. J. 920, 921.

The right to conduct water to the mill necessarily implies [5] the right to conduct it from the mill, and the statute in certain cases requires this to be done. (Sec. 4844, Rev. Codes.)

"Sluice-boxes, flumes, hose, pipes, railway tracks, cars, blacksmith-shops, mills, and all other machinery or tools used in working or developing a mine, are to be deemed affixed to the mine." (Sec. 4428, Rev. Codes.)

"A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or watercourse, or of a passage for light, air, or heat from or across the land of another." (Sec. 4429, Rev. Codes.)

From the evidence in this case, this ditch and flume, penstock and tail-race were necessary appurtenances to this mill, and as such they were reserved by the Western Mine Enterprise Company.

Plaintiff also claims that the location of this flume was [6] changed, and that the use to which the water was put was also changed, but the right to do this is granted by statute. (Sec. 4842, Rev. Codes.) And there is not any evidence here to show that the change, if any, in the location of the flume or the tail-race, or the mode of operation of the mill, added any burden to the servient estate, or caused any additional damage thereto.

Plaintiff also takes exception to the introduction of some evidence and the instructions of the court, but all of these were addressed either to showing the good faith of the defendant in its operations of this mill and the construction of the flume and the buildings, or to the theory adopted by the court that the flume, if necessary to the operation of the mill, was an appurtenance thereto.

"An entry upon the land of another under assertion of [7] title is an ouster (*West* v. *Lanier*, 28 Tenn. (Humph.) 9.) In *Ewing* v. *Burnet,* 11 Pet. 52, 36 U. S. 328, 9 L. Ed. 628,

it is said: 'An entry by one man upon the land of another is an ouster of the legal possession arising from the title, or not, according to the intention with which it is done. In legal language, the intention guides the entry, and fixes its character.'" (*Bramlett* v. *Flick*, 23 Mont. 95, 105, 57 Pac. 869, 872.)

The jury having found that the retort building did not encroach upon the territory of the plaintiff, and the penstock being a part of the flume, which the defendant had a right to maintain, and the pump-house, if it ever was an unlawful invasion of plaintiff's rights, having been removed prior to the commencement of this action, and the defendant having the right to maintain the tail-race, the evidence relating to damages becomes immaterial, for:

The only question remaining would be that with reference to [8] the toilet building, and that, according to the evidence, was only for temporary use, and the injury resulting therefrom, if any at all, is clearly too small to be a basis for the computation of any damages, unless *merely* nominal, and that is not sufficient to warrant reversal. (*Wallace* v. *Weaver*, 47 Mont. 437, 446, 133 Pac. 1099; 4 C. J. 1179; 3 Cyc. 447; 20 R. C. L., sec. 67, p. 285.) The right of the plaintiff to the land is fully protected by the judgment.

We recommend that the judgment and order appealed from be affirmed.

PER CURIAM: For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

Affirmed.

HUMBER, RESPONDENT, *v.* MARSHALL, APPELLANT.

(No. 4,344.)

(Submitted April 14, 1921. Decided June 6, 1921.)

[198 Pac. 747.]

Contracts—Sales—Special Damages—Loss of Business—Pleading—Appeal and Error — Instructions — Settlement—Objections Reviewable.

Appeal and Error—Settlement of Instructions—Objections Reviewable.

1. In its review of an alleged erroneous instruction, the supreme court is limited under section 6746, Revised Codes, to the particular objection to it urged upon the trial court at the time the instructions were settled.

Contracts of Sale — Breach — Counterclaims — Loss of Business — Special Damages—Pleading.

2. In an action to recover the purchase price of brick, in a counterclaim to which defendant averred under a general allegation that he had been damaged in a certain amount by plaintiff's failure to deliver the entire number of merchantable brick contracted for, by reason of which he was delayed in his building operations, the expense incurred in replacing defective brick was not recoverable in the absence of an allegation specially pleading such item of damage.

Same—Measure of Damages—Instructions—Refusal, When Proper.

3. Where the court had properly instructed the jury that defendant was not entitled to recover any damages on his counterclaim, it, as properly, refused an instruction defining the measure of his damages in that behalf.

Appeals from District Court, Silver Bow County; Edwin M. Lamb, Judge.

ACTION by Fred M. Humber against John W. Marshall. Judgment for plaintiff, and defendant appeals from the judgment and from an order refusing a new trial. Affirmed.

Mr. Percy Napton, for Appellant, submitted a brief; *Mr. C. B. Nolan*, of Counsel, argued the cause orally.

Messrs. Frank & Gaines, for Respondent, submitted a brief; *Mr. R. F. Gaines* argued the cause orally.

[60 Mont. 267.]

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Plaintiff brought this action to recover $753.75, alleged to be due as a balance of the purchase price of brick sold and delivered by plaintiff to defendant, and to foreclose a materialman's lien.

The answer denies all the allegations of the complaint and sets forth that defendant purchased from plaintiff 240,000 brick under an express warranty that they should be sound and merchantable, that 94,000 of the brick tendered were unsound and unfit for use, and that defendant refused to accept the same and notified plaintiff. As a counterclaim defendant alleges that he was compelled to pay demurrage in the sum of $48 upon the 94,000 brick, and that by reason of plaintiff's failure to deliver the entire 240,000 merchantable brick he was prevented "from carrying out his business as a contractor and builder and delayed the construction and building of buildings under construction on or about the said thirteenth day of April, 1917, to defendant's damage in the sum of $1,000." Upon the affirmative allegations issues were raised by reply.

At the instance of plaintiff, the court gave instruction No. 3, directing the jury that defendant had failed to prove his counterclaim and that he could not recover any damages. The court refused to give defendant's requested instruction No. 1, defining the measure of his damages.

From a judgment in favor of plaintiff and from an order refusing a new trial, defendant appealed, and in his brief assigned eleven errors, but upon the hearing in this court his counsel expressly waived all of them except the specification that the court erred in its rulings upon the two instructions above.

The record discloses that at the settlement of instructions coun-
[1] sel for defendant objected to instruction No. 3 given "for the reason that the testimony in the case shows that because of the breach of the contract upon the part of the plaintiff the

defendant was compelled to and did replace a certain number of brick, to-wit, 25,000, which 25,000, from the evidence, was the brick of the plaintiff, and the testimony shows said brick was inferior and not in keeping with the agreement entered into between the plaintiff and the defendant relative to the brick, and that the defendant replaced said brick by other brick, to his damage in the sum of $7.50 per thousand."

Section 6746, Revised Codes, which governs the settlement of instructions in civil cases and which defines the authority of the appellate court in its review of questions arising upon instructions given, provides, among other things: "On such settlement of the instructions the respective counsel, or the parties, shall specify and state the particular ground on which the instruction is objected or excepted to, and it shall not be sufficient in stating the ground of such objection or exception to state generally that the instruction does not state the law, or is against law, but such ground of objection or exception shall specify particularly wherein the instruction is insufficient or does not state the law, or what particular clause therein is objected to. * * * And no cause shall be reversed by the supreme court for any error in instructions, which was not specifically pointed out and excepted to at the settlement of the instructions as herein specified, and such error and exception incorporated in and settled in the bill of exceptions or statement of the case as herein provided." This statute is too plain to require construction. It limits this court in its review to the particular objections urged upon the trial court at the time the instructions are settled and is conclusive against the right of defendant to question the correctness of the court's ruling in giving instruction No. 3. (*Poor* v. *Madison River Power Co.*, 41 Mont. 236, 108 Pac. 645; *Allen* v. *Bear Creek Coal Co.*, 43 Mont. 269, 115 Pac. 673; *Surman* v. *Cruse*, 57 Mont. 253, 187 Pac. 890; *Sanborn Co.* v. *Powers*, 58 Mont. 214, 190 Pac. 990.) Instruction No. 3 refers only to defendant's counterclaim, which is predicated upon the delay caused [2] by plaintiff's alleged breach of warranty, and not upon

the additional expense incurred by defendant. The fact, if it be a fact, that defendant was compelled to purchase other brick to replace defective brick delivered by plaintiff, was not pertinent to any issue raised by the pleadings. The only item of special damages pleaded was the $48 paid for demurrage. The expense incurred in replacing defective brick could not have been recovered under the allegation of general damages contained in the counterclaim (*O'Brien* v. *Quinn*, 35 Mont. 441, 90 Pac. 166), and the court was fully justified in disregarding the objection interposed.

The court having instructed the jury that defendant was [3] not entitled to recover any damages, it would have erred grievously by giving defendant's instruction No. 1, defining the measure of his damages. The two instructions could not be reconciled upon any possible theory, and therefore it is unnecessary to discuss the merits or demerits of the instruction tendered. Furthermore, the record sustains the trial court in giving instruction No. 3, for there is not any evidence to prove the counterclaim pleaded.

The judgment and order are affirmed.

Affirmed.

Mr. Chief Justice Brantly and Associate Justices Reynolds, Cooper and Galen concur.

McKEEVER et al., Respondents, v. OREGON MORTGAGE CO., LTD., Appellant.

(No. 4,388.)

(Submitted April 15, 1921. Decided June 6, 1921.)

[198 Pac. 752.]

Contracts—Action by Third Party—Complaint—Insufficiency.

Contracts—Right of Action by Third Party—Complaint.

1. To entitle a third person to enforce a contract made between two others, under section 4970, Revised Codes, the complaint must show that it was expressly made for his benefit, or for the benefit of a class of persons to which he belongs, *i. e.*, he, or they, either

[60 Mont. 270.]

must be named therein or otherwise sufficiently described or designated; the fact that the contract may incidentally benefit him or them, being insufficient.

Same—Action by Third Party—Complaint—Insufficiency.

2. The complaint in an action by the vendors of land to recover the balance of the purchase price from a mortgage company which loaned the money to the vendee, setting forth the mortgage contract and alleging that the company had arranged with one of plaintiffs to hold the balance due until patent for the land should be received and recorded and then pay it directly to her, *held* insufficient, under the rule above, in the absence of an averment that the contract contained a provision that the mortgage was made expressly for the benefit of plaintiffs or either of them.

Appeals from District Court, Fergus County; Jack Briscoe, Judge.

Action by Susie S. and Joseph B. McKeever against the Oregon Mortgage Company. Judgment for plaintiffs, and defendant appeals from the judgment and from an order denying a new trial. Reversed and remanded.

Mr. E. K. Cheadle, for Appellant, submitted a brief; *Mr. J. A. Walsh,* of Counsel, argued the cause orally.

Mr. Ralph J. Anderson, Mr. S. P. Williams and *Mr. Chas. J. Marshall,* for Respondent, submitted a brief; *Mr. Anderson* argued the cause orally.

That the action brought by plaintiff may be maintained is established law in this jurisdiction. (Sec. 4970, Rev. Code; *McDonald* v. *American Nat. Bank,* 25 Mont. 456, 65 Pac. 896; *Tatem* v. *Eglanol Mining Co.,* 45 Mont. 367, 123 Pac. 28; see, also, 13 C. J. 707; *Morgan* v. *Overman Silver Min. Co.,* 37 Cal. 534; *Burson* v. *Bogart,* 49 Colo. 410, 113 Pac. 516; *Oregon Milling Co.* v. *Kirkpatrick,* 66 Or. 21, 133 Pac. 69; *Reilly* v. *Spokane Sanitary Laundry Co.,* 71 Wash. 516, 128 Pac. 1075.)

Where money is withheld from the proceeds of a loan, in order to clear the title and to pay off an encumbrance thereon, the intermediary holding the money is acting as the agent of the lender and not of the borrower. (*Travelers' Ins. Co.* v.

Jones, 16 Colo. 515, 27 Pac. 807.) The following cases are similar to the one at bar, and in all of them evidence was offered by the intermediary or the lender to the effect that the intermediary was not the agent of the lender, but was rather the agent of the borrower, but the courts in each of the cases held the evidence was sufficient to show that the intermediary was the agent of the lender. (*Bates* v. *American Mortgage Co. of Scotland*, 37 S. C. 88, 21 L. R. A. 340, 16 S. E. 883; *Matteson* v. *Blackmer*, 46 Mich. 393, 9 N. W. 445; *Jensen* v. *Lewis Investment Co.*, 39 Neb. 371, 58 N. W. 100; *Larson* v. *Lombard Investment Co.*, 51 Minn. 141, 53 N. W. 179.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On October 10, 1912, Susie S. McKeever and Joseph S. McKeever sold and conveyed to Clara I. Kitts and Senia L. Kitts 320 acres of land in Fergus county for the consideration of $7,600. In order to make payment for the land, the purchasers obtained a loan from the Oregon Mortgage Company, Limited, and secured it by a mortgage upon the purchased property.

In the complaint herein it is alleged that $5,834 of the purchase price was paid to Mrs. McKeever on the day of the sale, and that the balance ($1,766) was withheld pending the receipt of a patent to 160 acres of the land. It is further alleged that on the day of the sale, the defendant mortgage company "arranged" with Mrs. McKeever to hold the $1,766 until patent should be received and recorded, and then to pay it directly to her; that patent was thereafter received and recorded, and defendant notified, and that, though demand was made, the defendant has failed and refused to make payment. The prayer is for $1,766 and interest.

A general demurrer was interposed to this complaint, but it was overruled, and defendant then answered. It denied that it ever "arranged" or agreed to hold the $1,766, or any

amount, for Mrs. McKeever, or that it ever entered into any agreement of any kind or character with her. It admitted the sale by plaintiffs to the Madams Kitts, and that it advanced to the purchasers $6,000 and secured the loan by a mortgage upon the purchased property.

Upon these pleadings the cause was tried, resulting in a verdict and judgment in favor of the plaintiffs for the amount demanded, and defendant appealed from the judgment and from an order denying its motion for a new trial. It is insisted that the court erred in overruling the demurrer.

We would be at a loss to understand the theory upon which it is sought to impose upon the defendant mortgage company the duty to pay to Mrs. McKeever money which confessedly belonged to the Madams Kitts in the first instance, at least, but for the information vouchsafed by counsel for plaintiffs in their brief. They say: "This action * * * was brought on a contract between two persons for the express benefit of a third person. The mortgage was executed by the Mrs. Kitts, in favor of the defendant and appellant, for the express purpose of paying the debt owed by the Mrs. Kitts, to the McKeevers. This action was brought by the plaintiff and respondent on that contract."

In the absence of statute, most of the courts of this country [1] recognize and enforce a contract made between two parties for the benefit of the third, but some diversity of views appears relative to the character of the contract and the relationship of the parties. The rule most generally followed is that there must exist on the part of the original parties to the contract a clear intent to benefit the third party. (2 Elliott on Contracts, sec. 1413.) In *Lawrence* v. *Fox*, 20 N. Y. 268, the rule as stated above was adopted in the state of New York by a divided court, but later, in an action in which it was sought to apply the rule, the supreme court, in *Hoffman* v. *Schwaebe*, 33 Barb. (N. Y.) 194, said: "But there is a plain distinction between a promise, the performance of which may benefit a third party, and a promise made expressly for

the benefit of a third party." The latter contract was held to be within the rule; the former not within it.

When the Field Civil Code was reported to the legislature of New York in 1865, it assumed to state the rule according to the prevailing judicial opinion. Section 749 of that Code declares: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." In 1872 the Field Code was adopted in California, and section 749 above became section 1559 of the California Civil Code, and has continued in force since that date. Our Civil Code, adopted in 1895, was practically copied from the Field Code and the Civil Code of California, as is disclosed by the report of our Code Commissioners. Section 4970, Revised Codes, is a *verbatin* copy of section 749 of the Field Code. The language employed is significant. The contract must be made expressly for the benefit of the third party, and the word "expressly" means "in direct terms." (Webster's International Dictionary.) This is the meaning given to it by the California court long before our Code was adopted. (*Chung Kee* v. *Davidson*, 73 Cal. 522, 15 Pac. 100.)

It is held by practically all of the authorities that it is not sufficient that the contract may incidentally benefit the third party. (*Tatem* v. *Eglanol Mining Co.*, 45 Mont. 367, 123 Pac. 28.) The party for whose benefit the contract is made must be named or otherwise sufficiently described or designated. (*Bacon* v. *Davis*, 9 Cal. App. 83, 98 Pac. 71; 13 C. J. 711.) However, if the contract was made expressly for the benefit of a class of persons to which class the party seeking enforcement belongs, he may obtain the benefit of it. (*Burton* v. *Larkin*, 36 Kan. 246, 59 Am. Rep. 541, 13 Pac. 398.)

The only contract mentioned in the complaint in this action [2] as having been made between the Madams Kitts and the defendant mortgage company is the one evidenced by the mortgage itself. The mortgage was not introduced in evidence, and neither it nor a copy of it is attached to the

complaint. It is not alleged that it contains a provision to the effect that the mortgage company should pay the $1,766 to Mrs. McKeever, and therefore it cannot be said that it was made expressly, *i. e.*, in direct terms, for her benefit. So far as disclosed by the complaint, the mortgage was made primarily for the benefit of the Madams Kitts, to enable them to purchase the property mentioned. The burden was cast upon plaintiffs to prove that the mortgage was made expressly for their benefit or for the benefit of Mrs. McKeever (*Thomson* v. *Bettens*, 94 Cal. 82, 29 Pac. 336), and if it was necessary to prove this fact, it was equally necessary that it be alleged. The bare statement of these rules is sufficient to demonstrate that the complaint herein does not state a cause of action upon the theory advanced by counsel for plaintiffs, and we cannot conceive of any other theory upon which it can be sustained. In this view of the case it is unnecessary to consider the other assignments.

The judgment and order are reversed and the cause is remanded for a new trial.

Reversed and remanded.

Mr. Chief Justice Brantly and Associate Justices Reynolds, Cooper and Galen concur.

CASES DETERMINED

IN THE

SUPREME COURT

AT THE

JUNE TERM, 1921.

THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. FRANK B. REYNOLDS,
THE HON. CHARLES H. COOPER,
THE HON. WILLIAM L. HOLLOWAY,
THE HON. ALBERT J. GALEN,
} Associate Justices.

IN RE SMITH'S ESTATE. SMITH, RESPONDENT, *v.* SMITH, EXECUTRIX, APPELLANT.

(No. 4,346.)

(Submitted April 15, 1921. Decided June 20, 1921.)

[199 Pac. 696.]

Judgments—Res Adjudicata—Executors and Administrators—Claims Against Estates—When Established—Courts—Privies.

Judgment—Federal Court—Res Adjudicata—Claims Against Estate—Payment.

1. Plaintiff brought action in the United States district court to recover interest due from an estate on money belonging to plaintiff and used by decedent in his lifetime while acting as plaintiff's guardian. Defendant interposed the defenses of the statute of limitations, laches and noncompliance with the statute of nonclaim. Judgment for plaintiff was affirmed on appeal to the circuit court of appeals. Basing his claim upon the judgment thus obtained, plaintiff made demand upon the executrix for payment. The executrix submitted her final report to the state district court and petitioned for distribution of the estate and payment of outstanding claims, stating that the claim of plaintiff had not been paid. A beneficiary of decedent filed objections to payment of plaintiff's claim on grounds the same as those urged in the federal

[60 Mont. 276.]

court. A trial was had in the district court sitting in probate, evidence heard and judgment rendered for plaintiff. *Held*, that the questions raised by the objections were foreclosed by the judgment of the federal court, that the judgment of that court was conclusive under the doctrine of *res adjudicata*, and that the action of the trial court in again trying the same question determined by the federal court was error.

Same—State Court's Refusal to Give Effect to Judgment of Federal Court—Federal Question.

2. Where a state court refuses to give effect to a judgment of the federal court upon a point in dispute and within its jurisdiction, a federal question arises under the laws of the United States establishing the circuit court and vesting it with jurisdiction.

Same—Against Executors and Administrators—Establishment of Claim Against Estate.

3. A judgment against an executor or administrator upon a claim against the estate establishes the claim to be paid in due course of administration.

Same—Against Executors and Administrators—Binding upon Whom.

4. A judgment against the executor or administrator of an estate is in effect a judgment against the estate, and all persons interested in the estate, whether they be heirs, legatees or creditors, as privies are foreclosed by it on the merits of the claim.

Same—Who are Privies.

5. Privies are those who are so connected with the parties in estate, or blood or in law, as to be identified with them in interest, and consequently to be affected with them by the litigation, such as heir and ancestor, executor and testator, etc.

Same—What Deemed Adjudicated.

6. A right, question or fact, distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies.

Same—Decisions of Appellate Courts—Conclusiveness.

7. The judgments of appellate courts are as conclusive as those of any other courts, and they not only establish facts, but also settle the law, so that the law as decided upon any appeal must be applied in all the subsequent stages of the cause.

Same—Conclusiveness of Federal Judgment.

8. The judgment or decree of a federal court is binding and perfect between the parties until reversed, without regard to any adverse opinion or judgment of any other court of merely concurrent jurisdiction, and its integrity, validity and effect are complete in all respects between all parties in every suit and in every forum where it is legitimately produced as the foundation of an action or of a defense, either by plea or in proof, as it would be in any other circumstances.

Appeal from District Court, Meagher County; John A. Matthews, Judge.

---

5. Conclusiveness of judgment against persons not parties to the action, see note in 2 **Am. St. Rep.** 876.

[60 Mont. 276.]

IN THE MATTER of the estate of John M. Smith, deceased. From an order dismissing the contest of J. Stanley Smith against a claim of William Smith, Gertrude Mayn Smith, as the executrix of the estate of J. Stanley Smith, deceased, appeals. Affirmed.

Mr. H. G. McIntire, for Appellant, submitted a brief and argued the cause orally.

In the lower court it was contended by counsel of William Smith that the judgment of the United States court allowing his claim so far adjudicated the claim that its merits could not be further inquired into. The lower court rejected this contention.

Is the judgment of the federal court allowing respondent's demand so far *res adjudicata* and binding on the appellant as to estop her from urging the present objections and exceptions to the same? Is such a federal question presented by such judgment as will preclude this court from inquiring into the validity of the objections urged against the allowance of said demand? Is not such demand, under the Montana statutes, one that the executrix of John M. Smith, deceased, cannot legally recognize and allow?

In a settlement of the accounts of an executor the widest latitude, together with the right of amendment, is allowed. It is the duty of the court, in probate, to scrutinize carefully every item, and, even in the absence of specific objections, to disallow such items as are not warranted by law. (*Estate of More,* 121 Cal. 635, 54 Pac. 148; *Estate of Willey,* 140 Cal. 243, 73 Pac. 998.)

Section 7536, Revised Codes, provides that a judgment rendered against an executor "only establishes the claim in the same manner as if it had been allowed by the executor * * * and a judge [in other words, as though it had been originally allowed in pursuance of sections 7528 and 7529]; and the judgment must be that the executor * * * pay in due course of administration the amount ascertained

to be due * * * . No execution must issue upon such judgment nor shall it create any lien upon the property of the estate, or give to the judgment creditor any priority of payment."

In view of the above and the provisions of sections 7647 and 7648, it is apparent that such a judgment is not conclusive but may be attacked by any heir or person interested in the estate, in which category appears appellant's testator, both as son of the deceased John M. Smith and as a legatee under his will. This has been many times decided both by this court and the supreme court of California in construing the same statute. (*In re Mouillerat's Estate*, 14 Mont. 245, 36 Pac. 185; *In re Barker's Estate*, 26 Mont. 282, 67 Pac. 941.) True, in neither of these two cases was there a claim which had been allowed by the judgment of a court in pursuance of Revised Codes, section 7536, but in the light of that statute, this cuts no figure. (*Hall* v. *Cayot*, 141 Cal. 13, 74 Pac. 299; see, also, Church on Probate Law and Practice, 759.)

J. Stanley Smith, and consequently his executrix, was in no wise estopped by the judgment in the federal court allowing the said claim of William Smith, because: 1. He was not a party to the proceedings in said suit. To be estopped by a judgment, an essential prerequisite is that the party sought to be estopped was a party to the proceedings in which the judgment was rendered; 2. A party interested in an estate is given the right by statute to contest allowed claims (Rev. Codes, secs. 7647, 7648), hence he cannot be estopped by reason of the allowance of the claim; 3. The authorities directly hold he is not estopped. (1 Church on Probate Law, p. 759; *Hall* v. *Cayot*, 141 Cal. 13, 74 Pac. 299; *Estate of More*, 121 Cal. 635, 54 Pac. 148; see, also, note on pages 124 and 125 of 65 American Decisions; 2 Black on Judgments, 610, 938.)

Is any federal question involved in the present controversy by reason of the judgment of the federal court allowing the claim now objected to? The federal court, Judge Bourquin,

explicitly decided that there was not, in remanding the present proceeding to the state court, and that he was clearly right in so holding is abundantly borne out by the federal authorities. The precise point has been decided by the supreme court of the United States in the case of *Leather Mfg. Bank* v. *Cooper*, 120 U. S. 778, 781, 30 L. Ed. 816, 7 Sup. Ct. Rep. 777 [see, also, Rose's U. S. Notes]; and see, also, *Security Trust Co.* v. *Black River & Co.*, 187 U. S. 211, 47 L. Ed. 147, 23 Sup. Ct. Rep. 52; *Newberry* v. *Wilkinson*, 199 Fed. 673, 118 C. C. A. 111.

The effect, the weight, to be given to the judgment of the federal court allowing this claim is that and that only which should be given to the judgment of a state court in a similar case and under like circumstances. (2 Black on Judgments, sec. 938.) The trouble with counsel for claimant is that they are endeavoring to have given greater effect and weight to this allowance than could possibly be given to a judgment of the supreme court of the state in a like case, a contention founded on neither law nor reason. Of course, this court should and will give such effect to that allowance as would be given to a judgment of a state court in a like case, but no more.

Not being estopped by the action of the federal court, the contestant has the unquestionable right to make use of testimony adduced in that court. What conclusion the state court should draw from such testimony concerns itself alone. It cannot be hampered or controlled by the opinions of judges of any other tribunal. Nor are such opinions in anywise conclusive on this court. The duty of this court to construe the state statutes cannot be avoided because another tribunal has assumed that function. And that both the federal district court and the circuit court of appeals fell into error in the allowance of this claim, we submit, will be abundantly shown, and we add the comment of this court: "We approach the final determination of the case with the greatest respect for the decision of the learned judges of the circuit court of appeals. Nevertheless it is our duty to decide it in conformity with

the dictates of our own consciences." (*Smith* v. *Smith*, 45 Mont. 535, 125 Pac. 987.)

Messrs. Walsh, Nolan & Scallon, for Respondent, submitted a brief; *Mr. Wm. Scallon* argued the cause orally.

There is a federal question. The question whether a state court has given due effect to the judgment of a court of the United States is a question arising under the Constitution and laws of the United States. We note that appellant seems to confuse the matter of the existence of a federal question with the merits of that same question. The authorities to be referred to make clear that a federal question exists when the question arises of whether the state court has given due effect to the judgment of a court of the United States, and that a federal question then arises, even though its ultimate determination depends upon consideration of state law. Before proceeding to present the authorities, we shall make reference to Judge Bourquin's ruling on the motion to remand. The only remarks appearing in the opinion filed by him which might seem to express the view that there is no federal question is the following: "It may be observed a federal judgment is entitled to only the consideration given to a like state court judgment, a question of state law," citing *Crescent City Live Stock etc. Co.* v. *Butchers' Union Slaughter-house etc. Co.*, 120 U. S. 147, [30 L. Ed. 614, 7 Sup. Ct. Rep. 472], and the words, "This is not a 'federal question' within the Removal Act." Neither of these remarks constitutes a determination that no federal question was involved. It seems to mean that the particular point to which the remark is addressed involves a question of state law. That might be perfectly true, and yet a federal question might still exist. The observation regarding federal judgments is merely a statement of a general principle. The case of *Metcalf* v. *Watertown*, 128 U. S. 586, 32 L. Ed. 543, 9 Sup. Ct. Rep. 173, referred to by Judge Bourquin, simply showed that a suit brought to recover the amount of a judgment previously obtained in a federal court does not,

because of the fact that the suit is brought upon such a judgment, present a federal question which would give a federal court jurisdiction. The case referred to is that of *Metcalf* v. *City of Watertown.* The reference made by Judge Bourquin to 120 U. S. 141, 30 L. Ed. 614, 7 Sup. Ct. Rep. 472, is to the *New Orleans Slaughter-house Cases, viz., Crescent City etc. Co.* v. *Butchers' Union etc. Co.* The supreme court there said, quoting from a former case: "No higher sanctity or effect can be claimed for the judgment of the circuit court of the United States rendered in such a case, under such circumstances, than is due to the judgments of the state courts in a like case and under similar circumstances." That quotation was from the case of *Dupasseur* v. *Rochereau,* 88 U. S. 130, 22 L. Ed. 588, 590. In each of these cases it was expressly held that the question of whether " * * * a state court has given due effect to the judgment of a court of the United States is a question arising under the Constitution and laws of the United States * * * ." (See *Crescent City Live Stock etc. Co.* v. *Butchers' Union Slaughter-house etc. Co.,* 120 U. S. 141, 30 L. Ed. 617, 7 Sup. Ct. Rep. 472.) And Judge Bourquin says that if the judgment is not given the proper effect, this will be denial of a federal right, reviewable by the United States supreme court. He was dealing only with a question of removal and his remarks were directed to that. The merits of the federal question were not argued by us on the motion to remand, because they were not material. The only discussion was as to the existence of such a question, and the judge said there may be such a question involved in the case, but not "within the Removal Act," and it does not give a right to remove. Now, however, the question is presented to this court: What is the effect of the judgment of the federal court in the case of the claimant, William J. Smith, against Mrs. Mary M. Smith, executrix?

We make the point that while, as a general rule, a judgment of a federal court stands upon a similar footing as that of a state court, this is true on the condition that the determination

of the state court is, in effect, treated as a judgment. If it is not treated as a judgment, if it is not a judgment at all, the rule can no longer apply. There is then nothing to compare with. There is a state ruling, but no judgment. No such condition was present in any of the cases referred to in Judge Bourquin's decision, or in any case found by us. Said cases and others were reviewed by the United States supreme court. In *Southern Pacific R. Co.* v. *United States*, 168 U. S. 1, 42 L. Ed. 355, 18 Sup. Ct. Rep. 18, the court speaking of the effect of a judgment as *res adjudicata*, said: "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

We make the further point that state legislation cannot deprive a final judgment of a federal court of the essential attributes of a judgment. If it may do so, directly or indirectly, then the provisions of the Constitution of the United States—the supreme law of the land—giving to federal courts jurisdiction of controversies between citizens of different states, may be largely, if not wholly, nullified.

If a decision against an executor is not final as to anything, it is not a judgment at all. Under the California decisions that is the character of such a decision. The result is that the so-called judgment is not a judgment. Finality as to parties and privies is of the essence of a judgment. Without finality there is no judgment, in the proper sense of the term. Establishing a *prima facie* case is not rendering a judgment. That may be a finding or a ruling, or what not, but it is not a judgment, in the true sense. Section 6710, Code of Civil Procedure, provides: "A judgment is the final determination

of the rights of the parties in an action or proceeding." These propositions seem self-evident.

Therefore, we submit that a state cannot, by legislation affecting proceedings in its own courts, change or control the jurisdiction or powers or judgments of courts of the United States. It cannot convert these courts into mere chambers or commissions of investigation or advice. Neither can the jurisdiction and powers of federal courts in matters of claims against estates, of rights of heirship and kindred subjects, be so restricted or controlled. (*Lawrence* v. *Nelson*, 143 U. S. 215, 36 L. Ed. 130, 12 Sup. Ct. Rep. 440; *Hayes* v. *Pratt*, 147 U. S. 557, 37 L. Ed. 279, 13 Sup. Ct. Rep. 503; *Bover* v. *Chapman*, 119 U. S. 587, 30 L. Ed. 532, 7 Sup. Ct. Rep. 342; *Hess* v. *Reynolds*, 113 U. S. 73, 28 L. Ed. 927, 5 Sup. Ct. Rep. 377 [see, also, Rose's U. S. Notes].) In *Lawrence* v. *Nelson*, *supra*, it is said: " * * * The general equity jurisdiction of the circuit court of the United States to administer, as between citizens of different states, the assets of a deceased person within its jurisdiction cannot be defeated or impaired by laws of a state undertaking to give exclusive jurisdiction to its own courts."

The limitations of the rule are stated in *Byers* v. *McAuley*, 149 U. S. 608, 37 L. Ed. 867, 13 Sup. Ct. Rep. 906; *Yonley* v. *Lavender*, 88 U. S. 276, 22 L. Ed. 536. There is nothing in these cases in conflict with the views for which we contend. In *Yonley* v. *Lavender*, it was held that no execution could issue on a judgment against an administrator, and that it was to be paid in due course of administration, but, it was also said: "The recovery of judgment gave no prior lien on the property, but simply fixed the status of the party and *compelled the administrator to recognize it in the payment of debts.*" And in *Byers* v. *McAuley*, it is said: "A citizen of another state may establish a debt against the estate." (Citing *Yonley* v. *Lavender*.) It is impossible to reconcile these decisions of the supreme court of the United States with the theory that a judgment of a federal court merely estab-

lishes a *prima facie* case in favor of the claimant. See, also, *Sharon* v. *Terry*, 36 Fed. 337, 13 Sawy. 387, 1 L. R. A. 572, the decision in which case is referred to as authority in *Julian* v. *Central Trust Co.*, 193 U. S. 93, 48 L. Ed. 629, 24 Sup. Ct. Rep. 399.

MR. JUSTICE GALEN delivered the opinion of the court.

It appears that in the year 1878, John M. Smith and W. A. Smith, brothers, the latter being the younger, started in the ranch and sheep business in Meagher county. For about ten years thereafter they did most of their own work, kept no books, had no settlements, and owned a joint bank account, upon which each drew as funds were needed. W. A. Smith married in 1884, had three children, one boy, William Smith, the respondent herein, and two girls, Anna Maud and Nellie May, all of whom were born on the ranch in Meagher county, where the family resided until they moved to Castle, Meagher county, from which latter place Mrs. Smith deserted her husband during the latter's absence, taking the two girls with her and leaving the boy in a neighbor's care. In the fall of 1891, W. A. Smith took the boy to his sister, Mrs. Reynolds, living in Fayette, Ohio, and gave him into her care and keeping to rear. In the year 1893, having gotten possession of his two daughters, he also placed them with Mrs. Reynolds for similar purpose, and all three children grew up in her family and were with her in Ohio at the time of their father's death at White Sulpher Springs, Montana, on February 13, 1897.

Smith Bros. Sheep Company was formed in 1890 to take over the property and conduct the business of the two brothers. It was capitalized for 250,000 shares of the par value of $1 per share. Of the capital stock, 5,000 shares were issued to the wives of each of the brothers, for joining in the deeds; 100 shares were issued to J. A. McNutt, a brother-in-law, who was their bookkeeper from 1888 to 1901, and the balance of the stock was divided equally between the Smith brothers, 119,950 shares to each. John M. Smith's wife retained her

stock; and the wife of W. A. Smith disposed of all of hers, W. A. Smith finally getting 3,000 shares of it and John M. Smith 2,000 shares. During W. A. Smith's life he was vice-president of the company, being succeeded after his death by N. B. Smith, his nephew, who then held fifty shares of stock in the company. John M. Smith was president of the company from the time it was organized until his death.

N. B. Smith was designated and duly qualified as executor of the last will and testament of W. A. Smith. John M. Smith married in 1887, and died October 6, 1908, at Battle Creek, Michigan, being still a resident of Meagher county, Montana, and leaving estate therein. He designated as executrix of his will his widow, Mary Smith, who was appointed and qualified. She and his son, J. Stanley Smith, were the chief and residuary beneficiaries under the will.

John M. Smith was sixty-three years of age at the time of his brother's death, and both himself and wife were then in poor health, his wife being absent in California, where he wished to go to live. McNutt conceived the idea of selling the property, and, after discussing the matter, suggested the idea of taking the subject up with N. B. Smith, the executor of the estate of W. A. Smith, deceased. Thereafter, on January 24, 1898, the district court of Meagher county authorized a private sale of that portion of the stock of the Smith Bros. Sheep Company belonging to the estate of W. A. Smith, deceased, for not less than $75,000, it being the joint idea of the executor and of John M. Smith that the stock belonging to the estate of W. A. Smith would bring more if it were sold in conjunction with that of John M. Smith; ownership and control of the property in the one person appearing more desirable. So, in contemplation of making such sale, in June, 1898, McNutt was given an option on the whole property at the price of $190,000. Several attempts to make sale of the property to others failed, and finally the executor, N. B. Smith, offered the interest of the estate to John M. Smith for $85,000 cash, which, after considerable correspondence and

negotiations, resulted in the sale by the executor, confirmed by the court March 25, 1899, of the stock belonging to the estate to John M. Smith for the sum of $85,000. Thereafter, on June 12, 1899, a decree of final settlement and distribution being entered in the estate of W. A. Smith, deceased, and John M. Smith having qualified as guardian for the three minor children of W. A. Smith, on May 25, 1899, on June 14, 1899, the executor paid over to the guardian the amount remaining in his hands belonging to the estate, amounting to the sum of $82,174. The guardian used $82,000 of this amount in June, 1899, in liquidation of his indebtedness to the Union Bank & Trust Company, Helena, Montana, incurred in the consummation of the purchase of the property from the executor, notes for which, given to the bank, aggregated $85,000, and bore interest at the rate of nine per cent per annum. On December 11, 1900, long after such use of the funds in liquidation of his indebtedness, the guardian procured an order from the district court of Meagher county, authorizing him to borrow from himself as guardian the sum of $82,000 at the rate of three per cent per annum. Subsequently, in presenting his accounts in the matter of the guardianship, he charged himself only with interest on the balance due from time to time on such loan at the rate of three per cent per annum from the date of the court's order permitting him to borrow the money. The respondent having reached his majority by October, 1906, the estate and guardianship was finally closed and distribution made and the guardian discharged December 27, 1906.

In August, 1907, the respondent having learned from his sister that his guardian had not made full account and settlement with him, brought a suit in equity in Meagher county, Montana, wherein he alleged that the purchase of the stock by his guardian in the Smith Bros. Sheep Company was fraudulent, and sought to have the sale set aside to the extent of 40,983⅓ shares, his alleged interest therein as beneficiary under the will of his father. This action resulted adversely

to the respondent, and an appeal was taken to the supreme court of this state. On such appeal the supreme court affirmed the lower court (*Smith* v. *Smith*, 45 Mont. 535, 125 Pac. 987), holding that there was not such evidence of fraudulent transactions between the guardian and the executor as to warrant the court in setting aside the sale. Previously thereto, a contrary opinion on substantially the same facts was reached by the United States circuit court of appeals, ninth circuit, in the case of *Moore* v. *Smith*, 182 Fed. 540, 105 C. C. A. 78. In the federal court, the action was decided in the first instance adversely to the contentions of Nellie May Moore, but on appeal to the circuit court of appeals her contentions were upheld, as above indicated. Her action was instituted in the federal court because of diversity of citizenship.

Some time subsequent to the affirmance by the supreme court of this state of the judgment against the respondent in his suit, the respondent established a residence in the state of [1] California, and thereafter, on the fourteenth day of March, 1913, he exhibited and presented his claim and demand to the executrix of the estate of John M. Smith, deceased, in the sum of $17,015.23, being the amount alleged due and owing unto him for interest unpaid upon funds used and the difference between the rate actually paid by the guardian for the use of the money, *i. e.*, three per cent, and that which should have been paid, *i. e.*, eight per cent, compounded annually, from June 14, 1899, to June 14, 1908, the date of the guardian's final account, and simple interest thereon at eight per cent thereafter.

Within two months from this time, he brought suit upon such claim against the executrix in the district court of the United States for the district of Montana, which resulted in a decree in his favor for the total amount alleged to be due (*Smith* v. *Smith* (D. C.), 210 Fed. 947) and upon appeal to the circuit court of appeals this judgment was affirmed (*Smith* v. *Smith*, 224 Fed. 1, 139 C. C. A. 465). Thereafter, based upon such judgment of the federal court, the respondent made

demand upon the executrix for the payment of his claim, amounting to the sum of $24,844.99, together with interest at eight per cent per annum from February 10, 1914, the date of entry of decree by the federal court in respondent's favor; and in making and submitting her final account and petition for discharge, dated October 15, 1915, and filed in December, 1915, the executrix reported to the district court the facts respecting this claim, and that it remained unpaid. In the prayer of such petition, she asked that the claims unpaid and outstanding, together with interest thereon, be directed to be paid from funds belonging to the estate.

Thereafter, in December, 1915, J. Stanley Smith, son and beneficiary of John M. Smith, deceased, duly filed objections and exceptions to the final account and petition for distribution as respects the claim and demand of the respondent, William Smith. The grounds of the objections and exceptions being that the claim was not presented to the executrix of the estate of John M. Smith within ten months after the date of the first publication of the notice to creditors of the estate; that at the time the claim was presented to the executrix it was barred by the provisions of section 6449, subdivision 4, and section 6451, of the Revised Codes; that the claim has been adjudicated by the supreme court of Montana adversely to its validity, and that the claim was and is not a proper claim against the estate of John M. Smith, deceased. The respondent then secured a removal of the matter to the United States district court for the district of Montana, and after hearing in that court the proceeding was remanded to the state district court, as not involving a federal question.

An answer was then filed by the respondent herein and because of the death of J. Stanley Smith, the contestant, his widow and executrix, Gertrude Mayn Smith, was at the hearing substituted in his place. Evidence was introduced and heard upon the contest, and thereafter judgment and order was made and entered allowing and approving the final account of the executrix of the estate of John M. Smith, deceased, and

overruling and dismissing the contest of J. Stanley Smith, the appellant's testator, against respondent's claim, and payment thereof was directed. This appeal is from the order and judgment.

Five specifications of error are assigned by the appellant, all of which may be resolved into one question, namely: Did the court err in approving and allowing the claim of William Smith and ordering and directing the executrix of the estate of John M. Smith to pay the same?

Although several questions are raised and elaborately argued on this appeal, they have been foreclosed in respondent's favor by judgment and decision of the federal court. (*Smith* v. *Smith*, 210 Fed. (D. C.) 947; *Id.*, 224 Fed. 1, 139 C. C. A. 465)—for example, such matters as the bar of the statute of limitations, respondent's laches and noncompliance with the statute of nonclaim.

In our view of the case, the primary question before us for determination is the effect to be given to the judgment of the federal court in favor of respondent's claim. No conflict of judicial determination is here presented as between the state and federal court, for, as noted, the action brought by respondent in the state court was to set aside the executor's sale and recover specific property on grounds of fraud, while the federal judgment relied upon by the respondent and constituting the basis of his claim is misappropriation of the wards' money derived from the sale, and interest for the use thereof by the guardian. It is true that the federal and state courts came to diametrically opposite conclusions on the same state of facts, though the parties were not the same, on the question of the right of the ward to avoid the executor's sale and recover his proportion of the capital stock in the corporation. (See *Moore* v. *Smith*, 182 Fed. 540, 105 C. C. A. 78, and *Smith* v. *Smith*, 45 Mont. 535, 125 Pac. 987.) However, the judgment in each instance is separate and distinct, and involves no conflict of authority or of jurisdiction. The first case involved the application and construction of the state

laws by the federal court, as applied to a nonresident of the state of Montana, entirely within its jurisdiction; while the latter case involved like application of the laws of the state of Montana in a case presented by one of its citizens, entirely within its separate jurisdiction. Nellie (Smith) Moore brought her action in the federal court because of diversity of citizenship, as she had a right to do, and the respondent, being then a resident of the state of Montana, brought a similar action in the state court; he at that time not being in position to litigate the questions raised in the federal court. Both the federal and the state court in each of these cases was clothed with complete independent jurisdiction, and the contrary conclusions reached did not constitute an encroachment by either upon the absolute rights, province or jurisdiction of the other. The federal court did not assume to sit in review of the state court's judgment, nor to set aside the decree of the latter, and the state court considered and referred to the federal court's decision with "greatest respect." The judgment of each is entirely independent of the other within its own sphere and jurisdiction, and the judgments of the one will be recognized by the other in application of the doctrine of *res adjudicata.*

No higher sanctity or effect can be claimed for the judgment of the circuit court of the United States than is due to the judgment of the state courts rendered in a like case, under similar circumstances. (*Dupasseur* v. *Rochereau,* 21 Wall. 135, 22 L. Ed. 588; see, also, *Embry* v. *Palmer,* 107 U. S. 3, 27 L. Ed. 346, 2 Sup. Ct. Rep. 25; *Pittsburgh Ry.* v. *Loan & Trust Co.,* 172 U. S. 510, 43 L. Ed. 528, 19 Sup. Ct. Rep. 238; *Crescent City Co.* v. *Butchers' Union Co.,* 120 U. S. 141, 30 L. Ed. 614, 7 Sup. Ct. Rep. 472; *Hancock Nat. Bank* v. *Farnum,* 176 U. S. 640, 44 L. Ed. 619, 20 Sup. Ct. Rep. 506.)

The United States court is possessed with jurisdiction to administer the laws of the state where jurisdiction is dependent upon diversity of citizenship. Its judgment is therefore entitled in the courts of another state to the same faith and

credit which would attach to a judgment of a court of the state. (*Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111, Ann. Cas. 1913E, 875, 56 L. Ed. 1009, 32 Sup. Ct. Rep. 641.) The only effect that can be claimed for the judgment of the circuit court of the United States is such as would belong to the judgments of the state courts, rendered under similar cir-
[2] cumstances; but, where the state court refuses to give effect to the judgment of the federal court upon the point in dispute and within its jurisdiction, a federal question arises under the laws of the United States establishing the circuit court and vesting it with jurisdiction. (*Pittsburgh Ry.* v. *Loan & Trust Co.*, 172 U. S. 493, 43 L. Ed. 528, 19 Sup. Ct. Rep. 238.)

Federal court judgments and decrees, made and entered in a particular state, are given such effect only as is required with respect to the judgment and decrees of a state tribunal of equal authority under like circumstances. (*Pittsburgh Ry.* v. *Loan & Trust Co., supra;* 15 R. C. L., sec. 364.)

"The rule on this subject by the supreme court of the United States is as follows: The judgment and decrees of the federal courts, sitting in a particular state, are to be accorded in the courts of that state, whether by plea or in proof, such effect and such effect only as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority; and whether such due effect has been given by a state court to a judgment or decree of a federal court is a federal question, within the jurisdiction of the supreme court of the United States on a writ of error to the court of highest authority of the state. (*Crescent City Livestock Landing & Slaughter-house Co.* v. *Butchers' Union Slaughter-house & Livestock Landing Co.*, 120 U. S. 141, 30 L. Ed. 614, 7 Sup. Ct. Rep. 472; *Pittsburgh, C., C. & St. L. Ry. Co.* v. *Long Island Loan & Trust Co.*, 172 U. S. 493, 43 L. Ed. 528, 19 Sup. Ct. Rep. 238; *Hancock Nat. Bank* v. *Farnum*, 176 U. S. 640, 44 L. Ed. 619, 20 Sup. Ct. Rep. 506." 2 Black on Judgments, sec. 938.)

[60 Mont. 276.]

The case of *Cromwell* v. *County of Sac*, 94 U. S. 351, 24 L. Ed. 197, defining the common-law rule, is a leading case on the question of *res adjudicata*, and has been cited and followed in hundreds of cases, as shown by the extra annotations to the Lawyers' Edition of the Supreme Court Reports. In that case, Mr. Justice Field said: "In considering the question of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a *second action* upon the *same claim* or *demand* and its effect as estoppel in *another action* between the same parties upon a *different claim* or *cause of action*. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in *privity* with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever. But where the second action between the

same parties is upon a *different claim or demand*, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a *different cause of action*, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." (See, also, *Dowell* v. *Applegate*, 152 U. S. 327, 38 L. Ed. 453, 14 Sup. Ct. Rep. 611.)

The judgment before the lower court on final report and [3] account of the executrix, as regards which payment was contested by appellant's testator, was one of the federal court, predicated upon alleged rights not adjudicated by the state court. In fact, the subject was expressly reserved from decision, as Mr. Justice Smith, speaking for this court, said: "It may be that upon settlement of the guardian's accounts he should have been required to pay a greater rate of interest and for a longer period of time than was actually required of him, but that question is not before us; and, even if it should be answered in the affirmative, the fact cannot by relation characterize as fraudulent and void prior transactions which were in themselves honest and free from actual fraud." As noted from the language of that decision, the matter of interest was not before the court, and the subject was not adjudicated until decision of the federal court presented for our consideration on this appeal. (*Smith* v. *Smith* (D. C.), 210 Fed. 974; *Id.*, 224 Fed. 1, 139 C. C. A. 465.) The suit was not based on the same cause of action as that before the state court in *Smith* v. *Smith*. It is a wholly different cause of action. In discussing the subject, Judge Gilbert, speaking for the circuit court of appeals, in *Smith* v. *Smith*, 224 Fed. 1, 139 C. C. A. 465, said: "We find no merit in the plea *res*

judicata. The suit in the state court of Montana was brought solely to recover specific property and the profits accruing thereon. The judgment of the supreme court establishing the validity of the sale determined all the issues in that suit." And Judge Bourquin, in deciding favorably on the claim of the respondent in the district court of the United States for Montana (210 Fed. 947), said: "The plea of *res judicata* is not well founded. The former suit had no double aspect, and was based solely on rescission of a sale and to recover the specific property and accrued profits. It terminated by a judgment establishing the validity of the sale denying the right to rescind. The instant suit is based on misappropriation by the guardian of money received from said sale, and to recover interest as damages because thereof. Surely this suffices to demonstrate *res judicata* does not apply. * * * The cause of action herein was not in issue, nor determined nor open to determination in the former suit" (referring to the case of *Smith* v. *Smith*, 45 Mont. 535, 125 Pac. 987).

The questions of the application of the statute of limitation, respondent's laches, and the statute of nonclaim were all presented in defense in the federal courts, and were decided adversely to appellant's contentions herein, both by the United States district court for Montana as well as the circuit court of appeals. But question arises as to whether the contestant is in such relation of privity to the executrix, Mary Smith, as to apply the doctrine of *res adjudicata* to him.

By the provisions of section 7648, Revised Codes: "All matters, including allowed claims not passed upon on the settlement of any former account, or on rendering an exhibit, or on making an order of sale, may be contested by the heirs for cause shown," *etc.*

The contest in the instant case was made by J. Stanley Smith as an heir under and by virtue of the provisions of the section just quoted, but this section does not authorize or warrant a contest of a judgment so as to permit the district court, sitting in probate, to again make inquiry into the defenses

made and considered on the trial of the case leading up to judgment. The judgment itself is conclusive upon the district court as establishing the claim, and inquiry may not be made by it collaterally by way of review to determine whether or not the judgment of a court of competent jurisdiction was proper in view of the defenses made before it.

"A judgment rendered against an executor or administrator, upon any claim for money against the estate of his testator or intestate, only establishes the claim in the same manner as if it had been allowed by the executor or administrator and a judge; and the judgment must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due. A certified transcript of the docket of the judgment must be filed among the papers of the estate in court. No execution must issue upon such judgment, nor shall it create any lien upon the property of the estate, or give to the judgment creditor any priority of payment." (Section 7536, Rev. Codes.) It merely establishes the claim to be paid in due course of the administration of the estate. (*Gauss* v. *Trump*, 48 Mont. 92, 135 Pac. 910.)

"A judgment is the final determination of the rights of the parties in an action or proceeding." (Sec. 6710, Rev. Codes.)

Section 7914 Revised Codes, reads as follows: "The effect of a judgment or a final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:

"1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent; or in respect to the personal, political or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will or administration, or the condition or relation of the person.

"2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the par-

ties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity; provided, they have notice, actual or constructive, of the pendency of the action or proceeding."

Section 7917 provides: "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

The sections quoted are merely declaratory of the common-law rule relating to the effect of former judgments, as first announced in the *Duchess of Kingston's Case.*

Section 7502 reads in part as follows: "The executor or administrator is entitled to the possession of all the real or personal estate of the decedent, and to receive the rents and profits of the real estate *until the estate is settled, or until delivered over by order of the court or judge to the heirs or devisees," etc.*

"Under our system, the whole of the estate, both real and personal, goes into the possession of the executor or administrator, first for the payment of debts, and then for distribution under the will or the laws of succession." (*In re Tuohy's Estate,* 33 Mont. 230, 83 Pac. 486; see, also, *In re Higgins' Estate,* 15 Mont. 474, 28 L. R. A. 116, 39 Pac. 506.)

The executor or administrator is not only the personal representative of the decedent, but is also to a very great extent the representative of the creditors and of the heirs or legatees (18 Cyc. 206), and the executor or administrator is legally possessed for the time being of the personal property of which the decedent died possessed, and his authority extends so completely to all property as to exclude for the time being creditors, legatees and all others unofficially interested in the estate. They cannot follow such property specifically into the hands of others; but the executor or administrator is the only true representative thereof whom the law will regard. (18 Cyc. 206.) A bond is required of the executrix (sec.

7452) conditioned that she will faithfully execute the duties of the trust according to law (section 7454), and a judgment against the executrix in a probate proceeding, determining the amount of her indebtedness to the estate, is conclusive against the sureties, and cannot be inquired into collaterally. (*Botkin* v. *Kleinschmidt*, 21 Mont. 1, 69 Am. St. Rep. 641, 52 Pac. 563; *Kenck* v. *Parchen*, 22 Mont. 519, 74 Am. St. Rep. 625, 57 Pac. 94.)

Section 7530 reads: "When a claim is rejected either by the executor or administrator, or the judge, the holder must bring suit in the proper court against the executor or administrator within three months after the date of its rejection, if it be then due, or within two months after it becomes due, otherwise the claim shall be forever barred."

When the respondent's claim was rejected by the executrix, he sued her, as he was by this statute required to do. The statutory directions as to who shall be sued by the claimant specifically directs the suit to be brought "against the executor or administrator," and says nothing concerning the heirs, devisees, or legatees. The reason is self-apparent, *viz.*, the executor or administrator stands in a representative capacity of all interested in the estate. A cause of action is held to be decided between the same parties, not only when the same persons have appeared as parties themselves, but also when they have appeared by executors or administrators. (Herman on Estoppel and Res Judicata, sec. 164.)

Section 4787 provides as follows: "Testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death."

The property of a decedent without distinction is chargeable with the payment of his debts (secs. 4799 and 4800, Rev. Codes), and the heirs, devisees and legatees are not entitled to the actual possession of the property of the estate, either real or personal, until it has been administered upon in accordance with the law. The judgment of the federal court in the case before us constitutes an allowed claim against the

[60 Mont. 276.]

estate, and while a devisee or legatee may contest the allowance of the same, it will be ordered paid by the probate court like other approved claims against the estate, where the claim appears to have been adjudicated by a court having jurisdiction of the parties and subject matter of the action. Theoretically the legatee secures title to the personal property upon the death of the testator, but the property does not actually pass into the possession of the legatee until after all of the debts against the estate have been fully liquidated, so that upon final settlement and distribution of the property the assets in the hands of the executrix may be considerably reduced under the amount of the legacy at the time of the death of the testator. Judgment rendered by a court of competent jurisdiction against the executrix, standing in a representative capacity of the deceased, before final settlement and distribution of the estate, binds the heirs, devisees and legatees as privies thereto. The judgment being against the estate necessarily affects their rights.

The judgment of the federal court allowing and adjudi-
[4] cating the claim of the respondent is in truth and in fact one *in rem* rather than *in personam*. It is not against the executrix in her personal capacity or as a legatee, heir or otherwise; but rather against her in her representative capacity. In fact, it is a judgment against the estate, and all persons interested in the estate, whether they be heirs, legatees or creditors, are foreclosed by such a judgment on the merits of the claim.

"Privies are those who are so connected with the parties
[5] in estate or in blood or in law as to be identified with them in interest, and consequently to be affected with them by the litigation, as lessor and lessee, heir and ancestor, executor and testator." (See *Brown* v. *Chaney*, 1 Kelly (Ga.), 412, 2 Black on Judgments, 2d ed., sec. 534.)

In *Dunseth* v. *Butte Elec. Ry. Co.*, 41 Mont. 14, 21 Ann. Cas. 1258, 108 Pac. 567, the syllabus reads: "A litigant has no right, as against the same adversary, to have a question,

either of law or fact, relating to the same cause of action, twice adjudicated in the same or another court of like jurisdiction, unless a re-examination of the question has been regularly ordered." And in the course of the opinion, it is said: "If it be true, as apparently indicated by the pleadings in this case, that the cause came on for trial in the district court of Silver Bow county upon exactly the same state of the pleadings as had previously been presented to the federal court, then, whatever technical question of pleading may have been decided by the latter court became a thing adjudicated, so far as the state court was concerned, and, as the point decided disposed of the entire case, then the entire case became *res judicata* upon that state of the pleadings. If the plaintiff was dissatisfied with the ruling of the federal court, it was her privilege to appeal. She had not the right, however, to make the same record in the state court and ask that court, in effect, to reverse the ruling of the federal court. A litigant has no right, as against the same adversary, to have a question, either of law or fact, relating to the same cause of action, twice adjudicated, in the same court or another court of like jurisdiction, unless a re-examination of the question has been regularly ordered. (See *Kleinschmidt* v. *Binzel*, 14 Mont. 31, 43 Am. St. Rep. 604, 35 Pac. 460; *Agnew* v. *McElroy*, 10 Smedes & M. (Miss.) 552, 48 Am. Dec. 772.) And an erroneous ruling is just as conclusive as the correct one, if allowed to become final."

In 2 Black on Judgments, second edition, section 503, it is said: "This great principle of the conclusiveness of judgments is fairly imbedded in the jurisprudence of England. Though recognized with more or less distinctness from very early times, it was never so satisfactorily stated as in the great case of the Duchess of Kingston, where Chief Justice De Grey declared the rule to be that 'the judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or, as evidence, conclusive, between the same parties, upon the same matter directly in question in another

court.' This language, from being constantly quoted with approbation, has acquired almost the force of a statute. Another early and leading case upon the general subject is one decided by Lord Ellingborough, wherein he said: 'It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, that creates the estoppel.'" The general principle announced in numerous cases is that a [6] right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question or fact, once so determined, must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified. (*Southern Pac. R. Co.* v. *United States,* 168 U. S. 1, 42 L. Ed. 355, 18 Sup. Ct. Rep. 18.)

The judgments of appellate courts are as conclusive as those [7] of any other courts. They not only establish facts, but also settle the law so that the law as decided upon any appeal must be applied in all the subsequent stages of the cause. (1 Freeman on Judgments, 4th ed., sec. 249.) The judgment [8] or decree of a federal court when rendered is binding and perfect between the parties until reversed, without regard to any adverse opinion or judgment of any other court of merely concurrent jurisdiction. Its integrity, its validity, and its effect are complete in all respects between all parties in every suit and in every forum where it is legitimately produced as the foundation of an action or of a defense either by plea or in proof as it would be in any other circumstances. (*Crescent City Livestock Co.* v. *Butchers' Union,* 120 U. S. 141, 30 L. Ed. 614, 7 Sup. Ct. Rep. 472.)

In our view the judgment rendered by the federal court forecloses further discussion with reference to the subject. There is no warrant or authority or reason for permitting these questions to thus be further contested in the district

court, sitting in probate, in this contest, as it would amount to a rehearing on issues which have already been determined by the federal court. The judgment established the respondent's claim, and the district court, sitting in probate, upon hearing of the contest, was in error in receiving proof and making findings with respect to the merits of the judgment.

The order and judgment appealed from are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS and HOLLOWAY concur.

MR. JUSTICE COOPER, deeming himself disqualified, takes no part in this decision.

MARTIN ET AL., RESPONDENTS, *v.* HOVER ET AL., APPELLANTS.

(No. 4,671.)

(Submitted May 31, 1921. Decided June 20, 1921.)

[199 Pac. 694.]

Receivers—Appointment Without Notice—Insufficient Showing—Insolvency—Complaint—Verification by Incompetent—Insufficiency—Witnesses.

Receivers—When not to be Appointed.

1. Since the appointment of a receiver without notice is a harsh remedy, under which property rights are taken out of private hands and put in hands of a representative of the court, solely as an emergency measure, it should not be invoked if the applicant has any other adequate remedy.

Same—Insolvency of Defendant—Insufficient Showing.

2. Where, in an action to set aside an oil lease as fraudulent, the complaint and affidavit of plaintiffs upon which a receiver was appointed without notice, did not affirmatively show that defendants were insolvent, the appointment was unwarranted.

---

3. Affidavit or verified bill as essential to appointment of receiver, see note in Ann. Cas. 1913A, 608.

[60 Mont. 302.]

Same—Complaint and Affidavit—Verification.

3. A receiver may be appointed upon the complaint if verified upon positive knowledge, or upon the complaint and a proper affidavit so verified.

Witnesses—When Mental Incompetents may Testify.

4. The testimony of an incompetent person is admissible in evidence if the court is satisfied that he has sufficient mentality to appreciate the nature and obligation of an oath and is capable of giving a correct account of the matters which he has seen or heard with reference to the question at issue, his incompetency going only to the weight of his evidence.

Receivers—Complaint—Verification by Mentally Incompetent—When Insufficient.

5. Where the complaint in an action to set aside an oil lease on the ground of fraud alleged, *inter alia*, that the lessor was not only ignorant and without experience in business, but so far incompetent as to be incapable of understanding ordinary legal instruments and ever ready to follow any suggestions made or advice given him by one in whom he had confidence, his verification attached to the complaint had no evidentiary value, and was therefore insufficient as a foundation for the appointment of a receiver without notice.

Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

ACTION by James L. Martin and another, as guardians of Joseph Miller, an incompetent person, against Herbert A. Hover and others. From an order appointing a receiver, without notice, defendants appeal. Reversed.

Messrs. Belden & De Kalb and *Messrs. Gunn, Rasch & Hall*, for Appellants, submitted a brief; *Mr. M. S. Gunn* argued the cause orally.

Mr. Rufus Hopkins and *Messrs. Marshall & Dousman*, for Respondents, submitted a brief; *Mr. Charles J. Marshall* argued the cause orally.

MR. JUSTICE REYNOLDS delivered the opinion of the court.

Plaintiffs, as guardians of the estate of Joseph Miller, an incompetent person, seek a decree declaring that defendants Herbert A. Hover and Harry H. Schwartz, Jr., are involun-

---

4. On effect of insanity on competency of witness, see notes in 28 Am. St. Rep. 942; Ann. Cas. 1913E, 323; 37 L. R. A. 423; 46 L. R. A. (n. s.) 1028.

tary trustees, for Miller's benefit, of a certain oil and gas lease issued by the United States government to them covering certain real estate in Fergus county. After filing the complaint and before time for appearance of defendants had expired, the plaintiffs, upon an *ex parte* application, procured an order appointing a receiver of the lease and oil to be produced. Defendants Hover and Schwartz have appealed from the order appointing receiver. The other defendants are interested only by reason of certain agreements between them and Hover and Schwartz regarding the oil to be produced.

From the complaint we glean the following facts: In 1916 Joseph Miller made homestead entry upon the land in question. Under the federal law and regulations of the Department of the Interior, Miller was entitled to a preference right to explore the territory embraced within his homestead entry for oil and gas, and, in case of discovery within the time limited by the permit, he would then have a preference right to an oil and gas lease upon the premises. Defendants Hover and Schwartz induced Miller to procure permit for exploration and forthwith fraudulently procured from Miller an assignment of the permit. Thereafter oil was discovered and a lease was issued to Hover and Schwartz. Under this lease and through contracts with other parties, they have been, and now are, producing and disposing of oil from these premises. It is contended by plaintiffs that Miller is, and was at all times above mentioned, a mentally incompetent person, and that by reason of such incompetency defendants Hover and Schwartz were enabled to perpetrate the alleged fraud upon him. Plaintiffs were duly appointed guardians of Miller and are now prosecuting this action. Upon the theory that defendants Hover and Schwartz fraudulently obtained from Miller the permit, and as a result thereof fraudulently obtained the lease which plaintiffs contend should have been issued to Miller, plaintiffs urge that these defendants should be held to be involuntary trustees of said lease and of all oil heretofore produced, or hereafter to be produced by them by virtue thereof;

that they should account to plaintiffs for all oil so produced; and that they should be required to convey to Miller the said lease and all their rights thereunder. The complaint further alleges that, by reason of the fraudulent acts of Hover and Schwartz, Miller has been deprived and prevented from securing, holding or now having any legal title to said lease and has been impoverished. As grounds for the appointment of a receiver without notice, affidavit was filed by plaintiffs setting forth the fact that summons had been issued and placed in the hands of the sheriff of Fergus county, Montana, but that the sheriff had been unable to make service upon any of the defendants except defendant Luke, and that the remaining defendants cannot be found within the state of Montana, are nonresidents of the state of Montana, or are concealing themselves in the state of Montana in order to avoid the service of summons in this action, and that the property is being disposed of and oil is being removed, and that there is danger of all of the oil being lost, removed, taken out of the jurisdiction of the court, or being placed in the hands of innocent purchasers, so that the same cannot be reached. Upon this affidavit and the complaint, the court made the order appointing receiver without notice.

The order appointing receiver is attacked for various reasons, among which is the insufficiency of the complaint to state a cause of action, of which several grounds are alleged. Inasmuch as the order appointing receiver must be reversed on other grounds, and inasmuch as it does not appear that the sufficiency of the complaint was challenged in the court below by demurrer, or otherwise, resulting in any determination of this question by the trial court, we do not deem it advisable on this preliminary appeal to dispose of the merits of the case as involved in the questions raised as to the insufficiency of the complaint.

It is urged by defendants that there is no showing of such [1] emergency as would authorize the appointment of a receiver, in that there is no showing that defendants Hover and

Schwartz were insolvent. The special proceedings provided for the appointment of a receiver should not be invoked unless the circumstances of the particular case disclose the necessity of it. It is a harsh remedy, and under it property rights are taken out of private hands and put in the hands of a representative of the court, solely as an emergency measure. "The power to invoke the extraordinary remedy by which property is taken into the possession of the court is to be exercised sparingly, with unusual caution, and only to prevent manifest wrong imminently impending, or where the case shows clearly that the complaining party is in danger of suffering irreparable loss and there is no other plain, speedy or adequate remedy. Where the application is made, as in this instance, before a decision adjudging the title to be in the applicant, the appointment, if made, amounts in effect to a levy of an execution *in limine*, entailing costs, expenses and other hardships often out of proportion to the value of the property right sought to be protected. (*Hickey* v. *Parrot S. & C. Co.*, 25 Mont. 164, 64 Pac. 330.) Because of the extraordinary harshness of the remedy, courts of equity have ever been reluctant to apply it. If the applicant has any other adequate remedy, the application will be denied. * * * Since the remedy by receivership is an extraordinary one never to be allowed except upon a showing of necessity therefor (*Prudential Securities Co.* v. *Three Forks etc. R. Co.*, 49 Mont. 567, 144 Pac. 158), the plaintiff was further charged with the burden of presenting facts sufficient to disclose to the court the existence of such necessity." (*Montana Ranches Co.* v. *Dolan*, 53 Mont. 397, 164 Pac. 306.)

In this case it is insufficient to merely set forth the fraudu-
[2] lent acts, the probable loss of the oil, and the obligation on defendants to account, but plaintiffs must also show the insolvency of the defendants; for, if defendants are amply financially responsible and such obligations as the court should finally impose upon them in the nature of an accounting can be enforced, there is no need of a receiver. This court has

held that a receiver should not be appointed in such cases as this unless it affirmatively appears that the defendant is insolvent. (*Masterson* v. *Hubbert*, 54 Mont. 613, 173 Pac. 421.) Inasmuch as there is nothing in the complaint or affidavit charging the insolvency of the defendants, the court was not justified in making the order.

Question is also raised as to the sufficiency of the verifica-
[3] tion of the complaint as a basis for the order. Under our statutes, a receiver may be appointed upon the complaint if verified upon positive knowledge or upon the complaint and a proper affidavit so verified. In this case the only facts upon which the charge of fraud is based appear in the complaint. The complaint has one verification by the plaintiffs, as guardians, and one by Miller, the incompetent. The former verification affirmatively appears to be based entirely upon information and belief, except as to the allegations respecting the appointment of plaintiffs as guardians, and the general allegation that Miller is an incompetent person. The latter verification is made by Miller upon positive knowledge, and covers all the allegations of the complaint. The complaint, however, contains a paragraph setting forth in detail the mental incompetency of Miller; and his attorneys, in their zeal to make the allegations of incompetency sufficient beyond question, seem to have "overstepped themselves" by making Miller so incompetent that his affidavit has not any evidentiary value. We
[4, 5] recognize the rule that has heretofore been announced by this court and is uniformly supported by the opinions of other courts, that the testimony of an incompetent person is admissible in evidence if he has sufficient mentality to appreciate the nature and obligation of an oath and is capable of giving a correct account of the matters which he has seen or heard in reference to the question at issue. The court, upon being satisfied that a witness has such mentality, should allow the testimony to be taken and leave the question of its credibility to the jury, or to the court if the case is tried without a jury. (*State* v. *Berberick*, 38 Mont. 423; see discussion

commencing on page 442, 100 Pac. 209, on page 215 [16 Ann. Cas. 1077].) It is not to be overlooked, however, that before an incompetent is permitted to testify the court must first satisfy itself that the incompetent person has sufficient mentality to appreciate the nature and obligation of an oath. (*State* v. *Berberick, supra.*)

In this case the allegations of the complaint as to the incompetency of Miller are so strong that the court cannot escape the conclusion that he did not have sufficient mental capacity to appreciate the nature and obligation of an oath. The allegations of the complaint in this regard are as follows: "The said Joseph Miller was an uneducated and ignorant man, of very little education, totally without experience in business, and incapable of understanding ordinary legal instruments, and so deficient in mental and will power as to be unable to transact ordinary business affairs in a careful and prudent manner, or in any manner, to take care of his own interests; that he has, during all of such times, ever been ready to follow any suggestions or advice given to him by any person who gained his confidence, and that during all of these times he has been so mentally deficient that same is apparent from an ordinary conversation with him, and that persons dealing with him to any considerable extent must have an actual knowledge of such defective mental condition."

It is to be noted that not only is it alleged that Miller is ignorant, without experience in business, incapable of understanding ordinary legal instruments, but that he has "ever been ready to follow any suggestions or advice given to him by any person who gained his confidence," and that the same is apparent from an ordinary conversation with him. The irresistible conclusion is that, when he signed the verification to the complaint, he must have done so upon the suggestion of someone, presumably his attorneys, as he was "incapable of understanding ordinary legal instruments," and therefore would not have sufficient mentality to have done so upon his own initiative. It he did not know what he was signing, and

signed it merely because someone asked him to do so, and did not understand its contents, the complaint being at least as complex as the ordinary legal instrument, then in fact it was not his affidavit. Under these circumstances his affidavit cannot have any evidentiary value. It is contended by plaintiffs that, even though he did not understand the meaning of legal instruments and was mentally deficient, yet, under the rule hereinbefore referred to, he could testify as to the several facts set forth in the complaint as acts of fraud. The same principle, however, would apply to his testimony as would apply to his affidavit. If Miller should take the stand as a witness, and it should appear, not only that he was mentally incompetent, but that his offered testimony was based upon the suggestions and advice of someone in whom he had confidence, then the court would immediately conclude that he does not understand the nature and obligation of an oath and his testimony would be refused. In order that there may be no misinterpretation of our holding in this matter, we reiterate that if a person is merely incompetent, but still retains sufficient mentality to correctly narrate the facts involved in the issues in question, and does understand the nature and obligation of an oath and appreciates such obligation, he may testify, and his incompetency goes only to the weight of his evidence; but if he is so mentally deficient that he either cannot understand and appreciate the nature and obligation of an oath, or cannot correctly narrate the facts to which his testimony is pertinent, then his testimony should not be received. In this case, there being no sufficient affidavit or verification to the complaint, there was not sufficient foundation for the appointment.

The order appointing receiver is reversed.

Reversed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES COOPER, HOLLOWAY and GALEN concur.

STATE, RESPONDENT, *v.* PROUTY, APPELLANT.

(No. 4,600.)

(Submitted June 2, 1921. Decided June 20, 1921.)

[199 Pac. 281.]

Criminal Law—Attempted Rape—Exhibits—Harmless Error—Evidence—Trial Practice—Exceptions—New Trial—Newly Discovered Evidence—Technicalities.

Attempted Rape—Exhibits—Torn and Bloody Clothing—Prejudice—Presumption.

1. In a prosecution for attempted rape, the introduction in evidence of the clothing worn by the prosecuting witness, though immaterial, was not reversible error, where there was no evidence that the articles were muddy, torn and blood-stained, as claimed, and thus likely to inflame the minds of the jurors, and where the original exhibits were not certified to the supreme court for inspection; prejudice cannot be presumed, but must be made to appear affirmatively.

Same—Injuries—Evidence—Inflaming Minds of Jury—Harmless Error.

2. Where, in a prosecution for attempted rape, there was not any controversy as to the time when and the place where injuries were sustained by the prosecuting witness in jumping from plaintiff's rapidly moving automobile upon defendant's threat to repeat the assault, evidence relating to the injuries *held* not objectionable as calculated to inflame the minds of the jury.

Same—Evidence—Admissibility—Exception Necessary.

3. Where, after objection, a question was withdrawn and not answered, though the court had overruled the objection, no exception being reserved, the same question was propounded to another witness, without objection, and answered, alleged error in permitting the second question to be answered held not reviewable, in the absence of express exception thereto.

Same—Rulings on Evidence—Exceptions must be Reserved.

4. The rule declared by Chapter 135, Laws of 1915, *inter alia* providing that every ruling or decision of the district court on the admissibility of evidence shall be deemed excepted to, has reference to civil, not criminal cases.

Same—New Trial—What is not "Newly Discovered Evidence."

5. An affidavit in support of a motion for a new trial following a conviction for attempted rape that the prosecuting witness, some five months before the trial, said to affiant that, if defendant didn't "fork over," she "would send him over the road for the rest of his life," was not "newly discovered evidence" within the meaning of section 9350, Revised Codes, that expression meaning evidence discovered since the trial.

Same—New Trial—Newly Discovered Evidence—Affidavit of Defendant Required.

6. Failure of defendant to show by his own affidavit that alleged newly discovered evidence was not known to him at the time of the

[60 Mont. 310.]

trial warrants refusal to grant a retrial, affidavits of others in that regard being, as a general rule, insufficient.

Same—Credibility of Prosecuting Witness—Question for Jury.

7. The credibility of the prosecuting witness in a prosecution for attempted rape was a matter for determination by the jury, and its verdict of guilty establishes the truth of her testimony for all purposes.

Criminal Law—Trial—Technicalities.

8. A mere *apex juris* is not sufficient cause for the reversal or modification of a judgment.

Appeals from District Court, Lewis and Clark County; R. Lee Word, Judge.

ARTHUR D. PROUTY was convicted of an attempt to commit rape. From the judgment and from an order denying his motion for a new trial, he appeals. Affirmed.

Mr. A. H. McConnell, for Appellant, submitted a brief and argued the cause orally.

The court erred in overruling defendant's objection to the introduction in evidence of the clothing worn by the prosecuting witness at the time of the assault. It is the contention of the defendant that in view of the facts in this case, as shown by the state's witnesses, the clothing in question does not throw any light upon any controverted question of fact, and does not serve to strengthen any phase of state's case, and wholly fails to serve any useful or relevant purpose other than to excite and inflame the minds of the jury and to arouse prejudice against the defendant.

It has been held by an unbroken line of judicial decisions that articles of clothing, which do not throw any light upon any of the issues of the case, should not be introduced in evidence, and that their introduction under such circumstances constitutes reversible error. (16 C. J. 619; 2 Wharton's Crim. Evidence, sec. 941; *State* v. *McKnight,* 21 N. M. 14, 153 Pac. 76; *Cole* v. *State,* 45 Tex. Crim. 225, 75 S. W. 527; *Rollings* v. *State,* 160 Ala. 82, 49 South. 329; *Lucas* v. *State,* 50 Tex. Crim. 219, 95 S. W. 1055; *Christian* v. *State,* 46 Tex. Crim. 47, 79 S. W. 562; *Gillespie* v. *State,* 80 Tex. Crim. 432, 190

S. W. 146; *Flege* v. *State*, 93 Neb. 610, 47 L. R. A. (n. s.) 1106, 142 N. W. 276.)

The court erred in overruling defendant's objection to the introduction of evidence showing the nature and extent of the injuries sustained by the prosecutrix when she jumped from the automobile. Defendant objected to the introduction of such evidence. The objection was overruled. The question was withdrawn, but evidence showing in detail the nature and extent of the injuries sustained by the prosecutrix when she jumped from the automobile was subsequently permitted to be introduced through the witness, Dr. Barbour. We take it that the defendant would not be obliged to interpose an objection to the same question propounded to the doctor as to which the court had previously made a ruling adverse to the defendant.

The court erred in denying defendant's motion for a new trial upon the ground of newly discovered evidence. In a case such as this, where the conviction is based upon the testimony of the prosecutrix alone, a wide latitude should be allowed in inquiring into the motives which prompted the prosecution. (*State* v. *Gaimos*, 53 Mont. 118, 162 Pac. 596.) The testimony to the effect that the prosecutrix was after money would certainly have some weight with a jury, and would have a direct bearing upon the weight of her evidence. A like question was presented to the court in the case of *Shirwin* v. *People*, 69 Ill. 55, where a continuance of the case was sought owing to the absence of material evidence for the defense, and where it was held that refusal to grant a continuance was held reversible error. The new evidence in this case is practically identical with the absent evidence in the case last above cited and the same rule should apply. (See, also, *State* v. *Eckler*, 106 Mo. 585, 27 Am. St. Rep. 372, 17 S. W. 814; *State* v. *Harness*, 10 Idaho, 18, 76 Pac. 788; *State* v. *Abbott*, 65 Kan. 139, 69 Pac. 160.)

Mr. Wellington D. Rankin, Attorney General, being disqualified, *Mr. Jos. R. Wine*, County Attorney of Lewis and

Clark County, submitted a brief in behalf of Respondent and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The defendant was convicted of an attempt to commit rape, and appealed from the judgment and from an order denying his motion for a new trial.

Only three errors are assigned: (1) The admission in evidence of articles of apparel worn by the prosecuting witness at the time the assault is alleged to have been made; (2) the admission of evidence tending to show the extent of the injuries received by the prosecuting witness during the same evening; and (3) the refusal to grant a new trial on the ground of newly discovered evidence.

1. In their brief counsel for defendant contend that the [1] muddy, torn and bloodstained clothing could not illustrate any issue involved, and the introduction of it served only to excite and inflame the minds of the jurors, all of which may be true, but there is not anything in the record to justify the contention. There is not a scintilla of evidence to indicate that the articles of clothing were, or that any of them was, muddy, torn or blood-stained, and, though it may be conceded that the evidence was immaterial, it does not follow that the defendant is entitled to a new trial.

The rule which once prevailed in this jurisdiction, "Error appearing, prejudice will be presumed," was abrogated by the adoption of the Codes in 1895. Section 9415, Revised Codes, provides: "After hearing the appeal, the court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties." Prejudice is now no longer presumed. It must be made to appear either affirmatively by the record recital, or by the denial or invasion of some substantial right from which the law infers prejudice. (*State* v. *Hall*, 55 Mont. 182, 175 Pac. 267.) Counsel for defendant have not seen fit to have

the original exhibits certified to this court as they might have done, and cannot now insist that reversible error was committed by their introduction in evidence in the court below, since there is not anything in the record which indicates that prejudice was, or could have been, wrought.

2. The same thing may be said of the evidence relating to [2] the injuries received by the prosecuting witness; but in this instance there is an additional reason why counsel for defendant cannot complain. There is not any controversy concerning the time when and place where the injuries were received, and it is not possible that any juror could have been misled. The injuries were received after the alleged assault was committed and when the prosecuting witness jumped from the rapidly moving automobile in consequence of defendant's threat to repeat [3] the assault. The prosecuting witness was first asked to describe her injuries, but, after counsel for defendant had interposed an objection and the court had indicated a ruling favorable to the admission of the evidence, the question was withdrawn and was not answered by the witness at all. Later Dr. Barbour was asked to describe the injuries which he found upon the body of the prosecuting witness immediately after she was taken to the hospital, and, without objection from defendant's counsel, he did describe them somewhat minutely.

Counsel now insist that the duty did not devolve upon them to renew the objection when the question was asked of Dr. Barbour, since they had saved the point by the objection made when the question was asked the prosecuting witness, but the record does not bear them out as to the facts, and the rule of law is not so broad as they contend. The record fails to show that any exception was saved to the ruling made by the court when the question was asked for the first time. If counsel rely upon the provisions of Chapter 135, Laws of 1915, to supply the omission—that is, to preserve the exception for them—they are in error, for that statute deals only with the practice in civil cases. It is the rule now, as it always has been in this jurisdiction, that, in order to be available on

appeal, an express exception must be reserved to a ruling upon the admission of evidence in the trial of a criminal case. (*State* v. *Lewis*, 52 Mont. 495, 159 Pac. 415.)

The rule adverted to in *State* v. *Jones*, 48 Mont. 505, 139 [4] Pac. 441, presupposes that the exception was reserved, and that the question was answered; but where, as in this instance, the question was not answered by the prosecuting witness, it was necessary to repeat the objection when the question was asked of Dr. Barbour (38 Cyc. 1399). The withdrawal of the question propounded to the prosecuting witness left the record as though the question had not been asked.

3. The affidavit of Violet Brown was introduced in support [5] of defendant's motion for a new trial. In that affidavit it is stated that during September, 1918, after the assault is alleged to have been committed and before the information was filed, the prosecuting witness stated to affiant: "If he [defendant] doesn't fork over to me good and strong, I will send him over the road for the rest of his life."

Affiant states further that she never related this conversation to anyone prior to the trial, but that she did relate it to defendant about January 2, 1919, after his trial and conviction. These statements are irreconcilable. The trial of this case commenced June 16, 1919, more than five months after defendant was aware of the facts detailed in the affidavit, according to the affiant's own statement. If this is correct, then the evidence was not newly discovered evidence within the meaning of section 9350, Revised Codes.

In *Smith* v. *Shook*, 30 Mont. 30, 75 Pac. 513, this court announced the rule, which is manifestly correct, as follows: "The additional evidence to afford opportunity for the introduction of which a new trial is sought must be newly discovered, by which expression is meant that it must have been discovered since the trial. If discovered before or at the trial, and no continuance of the trial was applied for, an answer to the motion that no diligence is shown will be sufficient to

defeat it, no matter what else may be shown." (See also, 29 Cyc. 883–885.)

But, if the date (January 2, 1919) was written by inadvertence and was intended for January 2, 1920—a theory which is not even suggested by counsel for defendant—still the showing made is altogether insufficient to require the lower court to grant a new trial. In *State* v. *Matkins*, 45 Mont. 58, 121 Pac. 881, we announced the rules which determine the sufficiency of an application for a new trial upon the ground of newly discovered evidence as follows: "(1) That the evidence must have come to the knowledge of the applicant since the trial; (2) that it was not through want of diligence that it was not discovered earlier; (3) that it is so material that it would probably produce a different result upon another trial; (4) that it is not cumulative merely—that is, does not speak as to facts in relation to which there was evidence at the trial; (5) that the application must be supported by the affidavit of the witness whose evidence is alleged to have been newly discovered, or its absence accounted for; and (6) that the evidence must not be such as will only tend to impeach the character or credit of a witness." The doctrine of that case has since been adhered to in *State* v. *Van Laningham*, 55 Mont. 17, 173 Pac. 795, and in other cases.

The defendant did not make an affidavit, and this fact is [6] significant in view of the statements contained in the affidavit of Violet Brown. In any event, his failure to disclose that the evidence was not known to him at the time of the trial is fatal to his application. In *Smith* v. *Shook*, above, it was said further: "It is fundamental that the moving party must show by his own affidavit that the new evidence was not known to him at the time of the trial. Upon that question the affidavits of other persons are not, as a general rule, sufficient." To the same effect are *Roberts* v. *Oechsli*, 54 Mont. 589, 172 Pac. 1037, and *State* v. *Prlja*, 57 Mont. 461, 189 Pac. 64.

It is not contended, and could not be contended, that the [7] evidence is insufficient to sustain the verdict. If the story told by the prosecuting witness is true, the guilt of the defendant is established beyond any doubt. The credibility of that witness was for the determination of the jury, and by the verdict the truth of her story is established for all purposes of this case.

The objections to the admission of evidence are technical in [8] the extreme, while the showing upon the application for a new trial is altogether insufficient. Upon the entire record the defendant appears to have been accorded a fair and impartial trial. If any errors crept into the proceedings they are insignificant. "A mere *apex juris* is not sufficient cause for the reversal or modification of a judgment." (*State* v. *Connors*, 27 Mont. 227, 70 Pac. 715.)

The motion to dismiss these appeals heretofore interposed by the state is denied. The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, COOPER and GALEN concur.

STATE, RESPONDENT, *v.* BYRNE, APPELLANT.

(No. 4,725.)

(Submitted June 3, 1921. Decided June 20, 1921.)

[199 Pac. 262.]

Criminal Law—Murder—Demonstrative Evidence—Exhibits—Admissibility—Declarations of Co-conspirator—Jury—General Challenges—Proper Denial—Reception of Verdict—Presence of Defendant—Minutes of Court.

Murder—Demonstrative Evidence—Admissibility.

1. Demonstrative evidence is relevant and admissible, when it shows the commission of the crime or throws light on the way it was committed.

[60 Mont. 317.]

Same—Exhibits—Admissibility.

2. The bullet extracted from the body of deceased, bullets, empty shells and a cap found in the room where the homicide occurred, firearms and gloves found at the place where defendant was arrested, were all admissible under the rule that articles which are shown to have been connected with the commission of a crime, are admissible in evidence if they are properly identified and there has been no substantial change in them.

Same—Evidence—Parts of Body of Deceased—When Admissible.

3. Parts of the body of deceased may be exhibited to the jury in a homicide case, if first identified and shown to be in the same condition as when found or as at the time of burial.

Same—Skull of Deceased Admissible in Evidence, When.

4. Where the wounds from which deceased died consisted of a blow on the head and a shot through the body inflicted at the same time and by the same parties, admission of the skull in evidence was proper as a part of the testimony of the physician on the stand, in illustration of the character and extent of the injuries.

Same—Evidence—Map of *Locus in quo*, admissible.

5. A map prepared by the county surveyor illustrating the place where the homicide occurred and testified to by him as being correct was properly admitted in evidence.

Same—Declaration of Co-conspirator—When Admissible.

6. Evidence of the driver of an automobile in which defendant with three others were riding that upon his inquiry where they wanted to go, one of them directed him to the place of the homicide, was properly admitted, since all acted together and the direction was given without protest from defendant.

Same—Uncertain Identification of Defendant—Refusal to Strike—Harmless Error.

7. Refusal to strike the testimony of the wife of deceased that she "seemed to think" that it was the shorter of two men who struck deceased was not reversible error, where she also testified that the man in the lead dealt the blow and defendant admitted that he was the first man entering the room where the killing took place.

Same—Jury—General Challenges—Proper Denial.

8. General challenges of jurors "for the purposes of the record" who while stating on their *voir dire* that they had read the newspaper account of the killing of deceased and were of the opinion at the time that he had been murdered, did not state that they had any belief that defendant had committed the crime, but did say that they would follow the instructions of the court and render an impartial verdict, were properly denied.

Same—Trial—Reception of Verdict—Presence of Defendant—Minutes of Court—Sufficiency.

9. The contention that defendant was not present when the verdict was received, *held* without merit, where the minutes of the clerk recited, that, trial being resumed, "each party being present represented by counsel," rebuttal testimony was heard, the jury instructed, and the cause argued, that the jury retired and later returned in open court and submitted their verdict, which was filed and read by the

---

3. On admission in evidence of portions of body of deceased on trial for homicide, see note in 12 L. R. A. (n. s.) 238.

[60 Mont. 317.]

clerk in open court, no statement appearing that any adjournment of the court was had from the time it convened on that day to the filing and reading of the verdict.

Appeals from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

STEVE BYRNE was found guilty of murder in the first degree, and from the judgment of conviction and from an order denying a new trial, he appeals. Affirmed.

Mr. Joseph J. McCaffery, for Appellant, submitted a brief; *Mr. F. J. Sullivan,* of Counsel, argued the cause orally.

There was error in admitting the upper portion of the skull of the deceased in evidence. Modern authority condemns the practice of receiving in evidence grewsome exhibits which have no tendency to elucidate the issues and which tend to inflame and incite the passions and prejudices of the trial jurors. An examination of the exhibit will convince this court that it has no other tendency than to dethrone the reason of the jurors and not allow them to coolly and dispassionately consider the case in the light of the law and the facts. There was no substantial dispute as to the existence of the wounds, their character and effect. (*Melton* v. *State,* 47 Tex. Crim. 451, 83 S. W. 822; *Cole* v. *State,* 45 Tex. Crim. 225, 75 S. W. 527.)

The court erred in receiving in evidence a plat or diagram of the scene of the tragedy and the streets and buildings in the immediate vicinity. It will be noticed by an examination of the exhibit that there is certain wording upon the same. It was not shown that the witness had any knowledge of the facts conveyed to the jury by the statements on the exhibit. They were purely hearsay. (*Monmouth Mining & Mfg. Co.* v. *Regmier,* 49 Ill. App. 385.)

The record discloses that after the argument of counsel and the submission of the cause to the jury, they subsequently returned into open court and upon being polled after the verdict had been read answered that such was their verdict. The

record fails to disclose whether or not the defendant was present when the verdict was received, and it nowhere appears from the minute entries of the court on Friday, April 2, 1920, the last day of the trial, that said verdict was received in the presence of the defendant or that he was actually present during these proceedings, and no fair or reasonable construction of the record affirmatively establishes this indispensable fact. It is true that the record recites that the defendant was present that morning when the case was resumed, but his presence up to the time the jury retired would afford no reasonable basis for the conclusion that he was present when the verdict was received without doing violence to the ordinary rules of construction and common sense. This court and the members thereof know as a matter of common knowledge that after the case is submitted to the jury the court adjourns and reconvenes to receive the same. (*State* v. *De Lea*, 36 Mont. 531, 93 Pac. 814; *Humphrey* v. *State*, 3 Okl. Cr. 504, 106 Pac. 978; *Day* v. *Territory*, 2 Okl. 409, 37 Pac. 806; *Le Roy* v. *Territory*, 3 Okl. 596, 41 Pac. 612.)

Under section 9320, Revised Codes, as interpreted in the *De-Lea Case*, the record in this case fails to measure up to the requirements of the law, and is defective in this respect to such an extent as to require a reversal of this cause and that it be remanded for a new trial.

Mr. Wellington D. Rankin, Attorney General, *Mr. George Bourquin*, and *Mr. N. A. Rotering*, for Respondent, submitted a brief; *Mr. L. A. Foot*, Assistant Attorney General, and *Mr. Rotering* argued the cause orally.

A portion of the skull of the deceased was introduced in evidence. The defendant objected and now bases his first assignment upon the order of the court in overruling his objection. Demonstrative evidence like this is always competent and admissible. (*Territory* v. *Lobato*, 17 N. M. 666, L. R. A. 1917A, 1226, 134 Pac. 222; *People* v. *Besold*, 154 Cal. 363, 97 Pac. 871; *State* v. *Bailey*, 79 Conn. 589, 65 Atl. 951; *State* v. *Lewis*, 139 Iowa, 405, 116 N. W. 606; *McElwaine* v. *Com-*

monwealth, 154 Ky. 242, 157 S. W. 6; *Turner* v. *State*, 89 Tenn. 547, 15 S. W. 838, 842.)

Firearms taken from the room of the accused in a homicide case are admissible. The same may be said of the shells found where one of the appellant's companions stood when he was shooting at the wife of the deceased. (16 C. J. 618; *People* v. *Byrne*, 160 Cal. 217, 116 Pac. 521, 530; *Commonwealth* v. *Best*, 180 Mass. 492, 62 N. E. 748.) Cases which are directly in point are cited in 6 Encyclopedia of Evidence at page 700 of the supplement thereto.

Maps, when shown to be reasonably correct, are always admissible. (16 C. J. 745; 17 Cyc. 412.) Maps and photographs showing the topography of the place of the homicide are admissible. (*People* v. *Phelan*, 123 Cal. 551, 56 Pac. 424; *State* v. *Remington*, 50 Or. 99, 91 Pac. 473.) Private plats or lead pencil sketches are commonly received in evidence to illustrate the testimony of the witness. (*Drew* v. *City of Butte*, 44 Mont. 124, 119 Pac. 279.)

Appellant says that his challenges to Jurors O'Neill, Ball and Reese should have been sustained. Under section 9264, Revised Codes, they were properly permitted to sit. They all stated that any opinion which they might have would be laid aside; that their verdict would be based solely and only upon the evidence to be submitted and that they would accord a fair trial to all of the parties concerned. "On a trial for homicide a juror is not incompetent merely because he believes that deceased was murdered." (24 Cyc. 291; *State* v. *Olsen*, 88 Kan. 136, 127 Pac. 625; *Cason* v. *State*, 52 Tex. Crim. 220, 106 S. W. 337, 338; *State* v. *Ware*, 58 Wash. 526, 109 Pac. 359; *State* v. *McDaniel*, 39 Or. 161, 65 Pac. 520; *State* v. *Mott*, 29 Mont. 292, 306, 74 Pac. 728.)

MR. CHIEF COMMISSIONER POORMAN prepared the opinion for the court.

On the tenth day of December, 1919, the county attorney of Silver Bow county filed an information against the defendant,

Steve Byrne, and three others, charging them with the crime of murdering Sylvester J. Prenatt on the ninth day of December, 1919. The defendant, the appellant herein, was given a separate trial, which resulted in a verdict of guilty of murder in the first degree, the jury fixing the punishment at death. From the judgment entered on this verdict and from the action of the court in overruling the defendant's motion for a new trial, these appeals are taken.

From the evidence introduced by the state, it appears that the deceased was assaulted by several men in his house at No. 1717 B Street in the city of Butte, at about the hour of 2 o'clock on the morning of December 9, 1919, and was so badly injured that he died some two hours thereafter. The relation of the defendant to the tragedy, as appeared from this evidence, may be briefly traced.

On December 5 of that year, the defendant, in company with three others, went in a car to the vicinity of deceased's residence and drove around. At about 1 o'clock on the morning of December 8, the defendant, with three others, drove to the vicinity of the deceased's house, the defendant Byrne directing the driver where to go, and about 1 o'clock on the morning of December 9, the defendant and one other were driven to the vicinity of the deceased's residence, one of the men at the time wearing a cap. The defendant Byrne again directed the driver where to go. As they neared the place another car passed them, when, by direction of defendant, the driver turned the car, drove to a certain place, and stopped, when defendant and the other man got out of the car, defendant giving the driver direction where to wait with the car, about a block away. Soon after that, defendant came back to the car hurriedly, bareheaded, his left thumb bleeding, and said: "We got in a scrap." Getting in the car, he was driven to the Moose Block. The driver also heard shots just before defendant returned to the car. The testimony relating to the occurrences at the house is to the effect that Mrs. Prenatt heard knocking at the kitchen door, and, upon asking who was there, some man's

voice replied: "A friend of Mooney's." Mr. Prenatt had previously worked for a man by the name of Mooney. Mrs. Prenatt did not open the door, but while she was hurriedly dressing the deceased awoke, and was told by Mrs. Prenatt that a friend of Mooney's was at the door. Making some remark about that being funny, Prenatt arose from his bed, got a pistol from the drawer, and after some few minutes went to the door, opened it, and, seeing the men there, called to his wife that it was a holdup, and tried to shut the door; but the man on the outside crowded the door open, and the leading man struck Prenatt over the head with something, and the shooting then began. The two men whom Mrs. Prenatt saw entering the room wore masks. Mrs. Prenatt ran out of the front door, when someone standing outside fired three shots at her. She saw three men running out of the kitchen. The smaller man was bareheaded, and one of the men remarked: "Jesus Christ, we have killed him." One of the other men said: "Yes, and he got me." The men were laughing. She entered the room and attempted to call assistance by phone, but could get no response; and it subsequently developed that the telephone wires had been cut. The ladder was still standing by the side of the house. The doctor and other assistance arrived, and on examination it was found that the blow Prenatt had received on the head had broken the outer tablet of the skull, that he had been shot once through the hand, and one shot had entered his left breast, ranging upward, lodging in his neck. He was found lying on the floor with a black cap under his head. The bullet was extracted from the neck; other bullets were found in the room where the shooting occurred.

About 8 o'clock on the morning of the 9th of December, the officers went to the Moose Block, to room No. 4, supposed to be occupied by the defendant, but received no response to their knocking on the door. One of the officers looked through the transom and saw a man lying on the bed, but he would not respond to their calls; and one of the officers then raised the transom, got into the room, unlocked the door from the inside,

then discovered that the man on the bed had disappeared. There was a door there leading to another room, No. 5. The officers went into the hall and demanded entrance to room 5, but, receiving no response, broke in the door, but saw no one. On searching the bed, however, they found the defendant lying on the springs under the mattress. And in searching the room they found in a drawer one pistol with five empty shells in it, and another pistol with one empty shell. A pair of gloves was also found in a bureau drawer in room No. 4. The thumb of the left glove was moist.

A statement alleged to have been made by defendant was put in evidence, in which he says that they went out to this place to get $8,000 worth of whisky "which we suppose he had stolen, and we were going to steal it from him." He also admitted that he had no right out there, that some of the men with him were masked and carried guns, but that he himself was not masked. He also testified that the deceased was struck over the head, but that he himself did not do it, and that he had been shot once by the deceased and once by one of his companions. Shells were found at or near the place where the man stood who shot at Mrs. Prenatt. A map made by the county surveyor, illustrating the place of the tragedy and the surrounding country, was also introduced in evidence. Bullets were also found either on the floor or imbedded in the wall or furniture of the room where the tragedy occurred.

At the trial of the case, the portion of the skull showing the injury thereto, also the bullet taken from the deceased's neck, the map of the premises, the bullets found in the room where the shooting occurred, the cap found there, the guns and the gloves found in the room where the defendant was arrested, and the shells found at the point where the man stood who had fired at Mrs. Prenatt, were all admitted in evidence over the objection of the defendant, who assigns error by reason thereof.

[60 Mont. 317.]

Generally, it may be stated that "demonstrative evidence
[1–3] is relevant and admissible when it shows the commission of the crime charged, or throws light on the way it was committed."

"Articles which are shown by the evidence to be connected with the crime, or which serve to unfold or explain it, may be exhibited in evidence, provided they are properly identified," and provided there has been no "substantial change" in them.

"Weapons, tools, bullets, instruments, or other articles which appear from other evidence to have been employed in the commission of the crime are admissible in evidence."

"Parts of the body of deceased may be exhibited to the jury in a homicide case, provided they are first identified and are shown to be in the same condition as when found after the homicide, or as at the time of burial." (16 C. J. 617–622.)

And it is not error to admit in evidence the skull, or por-
[4] tions thereof, of the deceased in a homicide case, when, as in the present case, the same was in effect a part of the testimony of the physician, and was necessary to illustrate the character and extent of the injuries, and it appears here that the injury to the head caused by the blow and the injury caused by the shooting were inflicted at the same time and by the same parties. The court did not err in admitting Plaintiff's Exhibit C, being a portion of the skull of the deceased. (*Territory* v. *Lobato*, 17 N. M. 666, L. R. A. 1917A, 1226, 134 Pac. 222; *State* v. *Bailey*, 79 Conn. 589, 65 Atl. 951; *Thrawley* v. *State*, 153 Ind. 375, 55 N. E. 95, 99; *State* v. *Teale*, 154 Iowa, 677, 135 N. W. 408, 410; *McElwaine* v. *Commonwealth*, 154 Ky. 242, 157 S. W. 6.)

"On a trial for assault with intent to kill, a map of the
[5] *locus in quo*, shown to have been made by a competent surveyor, who was also a disinterested person, was competent, though made at the direction of the district attorney, to illustrate his theory of the case." (*State* v. *Remington*, 50 Or. 99, 91 Pac. 473.) Maps and photographs showing the topog-

raphy of the place of the homicide are admissible. (*People* v. *Phelan*, 123 Cal. 551, 56 Pac. 424.) The general rule with reference to the admissibility of maps and diagrams appears to be: "Unofficial maps, diagrams, plats, or plans representing things which cannot be as conveniently and as clearly described by witnesses, when proven to be correct, or when offered in connection with the testimony of a witness, are admissible as legitimate aids to the court and jury. A showing of the approximate correctness is sufficient." (16 C. J. 745.) The map in the present case, State's Exhibit B, was made by the county surveyor, and testified to by him as being correct.

In relation to the admissibility of exhibits such as appear in this case, we will cite the following additional authorities: *People* v. *Way*, 119 App. Div. 344, 104 N. Y. Supp. 277; *Id.*, 191 N. Y. 533, 84 N. E. 1117; *Turner* v. *State*, 89 Tenn. 547, 15 S. W. 838; *Wilganowski* v. *State*, 78 Tex. Crim. 328, 180 S. W. 692, 699; *People* v. *Byrne*, 160 Cal. 217, 116 Pac. 521, 530; *Commonwealth* v. *Best*, 180 Mass. 492, 62 N. E. 748. No error was committed by the court in admitting in evidence any of the exhibits complained of.

While the defendant and three other men were being con-
[6] veyed to the vicinity of the Prenatt house on December 5, the driver of the car asked them, "Where to?" and someone in the back seat said, "1717 B Street." The defendant at that time was sitting in the rear seat, but it is not shown that it was the defendant who gave the answer, nor is it necessary that it should be. The parties were evidently acting together, and the statement was made in the presence of the defendant, without any protest or modification from him, and it is very apparent from the remainder of the testimony that that is the place to which the defendant, as well as the others, wanted to go. The order was given either by the defendant or one of his companions, and that is all that the law requires. (Sec. 7887, Rev. Codes; *State* v. *Fisher*, 54 Mont. 211, 169 Pac. 282.)

[60 Mont. 317.]

Defendant's specification No. 9 is directed to the action of [7] the court in refusing to strike out a part of the testimony of Mrs. Prenatt. In testifying relative to the men going into the room when the assault was first made, she said there was a tall man and a shorter man, and that the man in the lead was the one who struck Mr. Prenatt; and, when asked whether it was the taller or the shorter man, she said: "I seem to think it was the shorter man." This language is objected to. From the statement introduced in evidence as admission on the part of the defendant, it appears that the defendant was himself the first man in the room, as it there appears that he rapped at the door, and when the door was opened from the inside the men back of him pushed him in. In discussing this assignment of error, the defendant's argument is that it singled out the defendant as the party who delivered the blow. By the evidence of the witness it was the party in the lead who delivered the blow, whether he was the shorter or the taller man. It does not appear, either from the evidence or from the argument of defendant's counsel, that the defendant was in any manner prejudiced by this statement.

By assignments 12, 13, 14, the appellant maintains that [8] the court erred in refusing to sustain his challenge to the jurors O'Neill, Ball and Reese. The challenge made in each instance was: "We challenge the juror for the purpose of the record." The challenges, it will be noticed, do not specify any grounds or reason or cause, but are wholly general. The Juror O'Neill stated that he had read the account of the homicide, and that he at the time had the opinion that Prenatt was murdered. The juror also stated that he felt at the time of the examination that Prenatt was murdered. The Juror Reese stated that he had read the newspaper account at the time of the killing of Prenatt, and that he had an opinion that Prenatt was dead, and according to the newspaper he was murdered, but each of the jurors stated he would follow the instructions of the court and render a fair and impartial verdict. Not one of the jurors stated that he had any belief

that the defendant committed the crime, and the court did not err in denying the challenges. (Sec. 9264, Rev. Codes; *State* v. *Howard,* 30 Mont. 518, 77 Pac. 50; *State* v. *Haworth,* 24 Utah, 398, 68 Pac. 155, 158; *State* v. *Hoerr,* 88 Kan. 573, 129 Pac. 153, 156; *State* v. *Ware,* 59 Wash. 526, 109 Pac. 359; *People* v. *Foglesong,* 116 Mich. 556, 74 N. W. 730.)

By assignment No. 16, the defendant claims that "the court [9] erred in receiving the verdict in the absence of the defendant." The clerk's minutes of April 2, 1920, contain the statement: "This day the trial of this case being resumed, each party being present represented by counsel as before, and the jury being present." It is then recited that rebuttal testimony was heard, the jury were instructed, the cause was argued, the jury retired, and later returned in open court and submitted their verdict, which was filed and read by the clerk in open court. There is not any statement directly or indirectly, or any inference that any adjournment of court was had from the time it convened to resume the trial on that date and the filing and reading of the verdict returned by the jury. The question presented by the assignment is: "Does the record sufficiently show that the defendant was present at the time the verdict was received?" This question, under a similar record, has heretofore been considered and determined by this court adversely to the contention of the appellant herein, in which it was held that, construed fairly, this language must be held to mean that the defendant was present at the time the verdict was received. (*State* v. *Hall,* 55 Mont. 182, 187, 175 Pac. 267.) The decision in the *Hall Case* is supported by the great weight of authorities, some of which we here cite: *People* v. *Holmes,* 118 Cal. 444, 50 Pac. 675; *Sewell* v. *People,* 189 Ill. 174, 59 N. E. 583; *Feddern* v. *State,* 79 Neb. 651, 113 N. W. 127; *State* v. *Beedle* (Mo.), 180 S. W. 888; *Hughes* v. *State,* 109 Wis. 397, 85 N. W. 333, 336; *Kraimer* v. *State,* 117 Wis. 350, 93 N. W. 1097; *State* v. *Starr et ux.,* 52 La. Ann. 610, 26 South. 998; 17 C. J. 219.

We find no error in this record, and recommend that the judgment and order appealed from be affirmed.

PER CURIAM: For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

Affirmed.

STATE, RESPONDENT, v. CHRONOPOULOS, APPELLANT.

(No. 4,726.)

(Submitted June 3, 1921. Decided June 20, 1921.)

[199 Pac. 266.]

Criminal Law—Murder—Evidence—Admissibility—Appeal and Error—Instructions—When Review Unauthorized.

Appeal and Error—Instructions—When Review Unauthorized.

1. Where defendant, through his attorney, at the settlement of the instructions, stated that he had no objections to them, assignments based on alleged error in them cannot be considered on appeal.

Murder—Conversation in Presence of Defendant—Identification—Evidence—Sufficiency.

2. Testimony as to a conversation had in the presence of defendant, a Greek, with others engaged with him in the commission of the homicide of which he was convicted was admissible though the witness was unable to positively identify defendant as having been present, merely referring to him as a Greek, where the identification was made complete by other testimony, including that of defendant, who understood the English language.

Appeals from District Court, Silver Bow County; J. J. Lynch, Judge.

THEODORE CHRONOPOULOS was found guilty of murder. From the judgment and the order overruling his motion for a new trial, defendant appeals. Affirmed.

Mr. I. G. Denny, Mr. William M. Wilson and *Messrs. Canning & Geagan,* for Appellant, submitted a brief; *Mr. M. F. Canning* argued the cause orally.

[60 Mont. 329.]

Mr. Wellington D. Rankin, Attorney General, *Mr. George Bourquin* and *Mr. N. A. Rotering,* for Respondent, submitted a brief; *Mr. L. A. Foot,* Assistant Attorney General, and *Mr. Rotering* argued the cause orally.

MR. JUSTICE REYNOLDS delivered the opinion of the court.

Defendant was charged with the murder of one Sylvester J. Prenatt, in Silver Bow county, on the ninth day of December, 1919. Trial was had to a jury, which rendered a verdict finding him guilty of murder in the first degree, and fixing his punishment at death by hanging. Motion was made for a new trial, which was overruled. Defendant has appealed from the judgment and the order.

The record discloses that defendant, in company with Steve Byrne and others, went to the home of deceased about 2 o'clock in the morning, and, after gaining admission to the house, killed the deceased. A full and complete statement of facts involving the matter is set forth in an opinion handed down this date (*State* v. *Byrne, ante,* p. 317, 199 Pac. 262), written by Chief Commissioner Poorman, to which reference is made for such other facts as may be pertinent to this case.

Five assignments are made on the ground that the court [1] erred in giving to the jury certain instructions. The record, however, discloses that at the time the instructions of which complaint is made were offered, the court expressly asked the defendant if he had any objections to them, and defendant, unequivocally, by his attorney, replied that he did not. As no objections were made to the giving of these instructions, this court has no authority to review them. (Rev. Codes, sec. 9271; *State* v. *Hill,* 46 Mont. 24, 31, 126 Pac. 41; *State* v. *Fowler,* 59 Mont. 346, 196 Pac. 992.) However, in view of the importance of this case, we have carefully examined the instructions, and are satisfied that no error was committed by the court in the giving of any one of them.

[60 Mont. 329.]

It is alleged that the verdict and judgment are contrary to law. Appellant, however, fails to point out wherein the verdict and judgment are contrary to law, and from our examination of the case we are unable to find that there is any merit in such assignment.

It is urged that the verdict and judgment are contrary to the evidence in the case. It is true that the verdict and judgment are contrary to defendant's evidence, but there is abundant competent evidence on behalf of the state showing defendant's participation in the crime charged.

Appellant contends that the court erred in admitting the tes-
[2] timony of the state's witness, Edgar McIntosh. This witness testified to a conversation which took place in the presence of defendant, but in his testimony was unable to identify positively the defendant as being present merely referring to him as a Greek. However, the identification is made complete by other testimony in the case, including that of the defendant himself. The record shows that defendant, even though a Greek, understood the English language, and the conversation was with other parties engaged with him in the commission of the crime. We are unable to see any error in the admission of this testimony.

For these reasons, the judgment and the order denying motion for new trial are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES COOPER, HOLLOWAY and GALEN concur.

STATE, RESPONDENT, v. WALLIN, APPELLANT.

(No. 4,625.)

(Submitted June 2, 1921. Decided June 20, 1921.)

[199 Pac. 285.]

Criminal Law—Grand Larceny—Banks and Banking—Trusts—Bailment—Information—Evidence — Insufficiency — Criminal Intent.

Grand Larceny—Ownership of Property—Evidence—Insufficiency.

1. In a prosecution for grand larceny the information charged defendant, while acting as cashier of a bank, with having stolen a Liberty Bond, the property of one L. and purchased by him on the installment plan. The bond was one of a number subscribed for by the bank to a reserve bank and held in trust for the individual subscribers until full payment therefor was made by them. *Held*, that title to the bond in question was in the bank, and did not pass to L., under section 4632, Revised Codes, until it was identified on delivery to L. upon final payment, and that, therefore, at the time of the alleged offense, several months prior to delivery, he was not the owner thereof.

Same—Property in Defendant's Possession by Virtue of Office—Information—Insufficiency.

2. An information charging that, while acting as cashier of a bank, defendant feloniously converted a Liberty Bond to his own use, was insufficient for failure to allege that the bond came into his possession by virtue of his office.

Bailment—Ownership of Property in Whom.

3. In bailment, the ownership of the chattel is in the bailor, and the possession only in the bailee.

Trusts—Personal Property—Legal Title, in Whom.

4. In a trust of personal property, the legal title is in the trustee.

Grand Larceny by Bailee—Evidence—Insufficiency.

5. Where the legal title to a bond was in a bank as trustee and in the possession of it in the cashier only by virtue of his office, a prosecution against the latter under subdivision 2 of section 8642, Revised Codes, under a charge of larceny by bailee, could not be maintained.

Same—Criminal Intent—Evidence—Insufficiency.

6. Since, to constitute the crime of larceny there must have been a criminal intent to permanently deprive the owner of the property taken, evidence showing that defendant cashier delivered a Liberty Bond held in trust by his bank for a subscriber, in behalf of his bank, as collateral security to another bank, with the intention that

---

6. On the question of intent or offer to return, or actual return of, property as affecting charge of embezzlement or larceny, see notes in **Ann. Cas.** 1916C, 90; **52 L. R. A. (n. s.) 1013.**

[60 Mont. 332.]

it should be redeemed within a short time, which was done before the information against him for larceny was filed, *held* insufficient to support a verdict of guilty.

Criminal Law—Conviction for Crime not Charged Unauthorized.

7. Conviction cannot be had of one offense upon an information which charges an entirely distinct and unrelated crime.

Appeals from District Court, Rosebud County; George P. Jones, Judge.

W. J. WALLIN was convicted of grand larceny and appeals from the judgment and order denying a new trial. Reversed and remanded, with directions to dismiss the information and discharge the defendant.

Cause submitted on brief of Appellant.

Mr. C. H. Loud and *Messrs. Nichols & Wilson,* for Appellant.

Taking the property of another, with intent to pledge the same, amounts to taking *animo furandi,* if there be no reasonable likelihood of ability to redeem, or if the intention to redeem be only a vague and indefinite one. But one who pledges borrowed property, with the intention of redeeming and restoring it to the owner, and having a fair and reasonable expectation of so doing, is not guilty of larceny. (25 Cyc. 47, 48; *Regina* v. *Phetheon,* 9 Car. & P. 552; *Blackburn* v. *Commonwealth* (Ky.), 89 S. W. 160.) "Where defendant, having borrowed a diamond ring, pawned it with intent to redeem it, and without any intent to permanently deprive the owner of the property, he was not guilty of theft as bailee; the fraudulent intent existing at the time of the conversion being an essential element of the offense." (*Taylor* v. *State,* 50 Tex. Crim. 377, 97 S. W. 473; *State* v. *Ward,* 96 Wash. 550, 165 Pac. 794.) In *Valley Mercantile Co.* v. *St. Paul F. & M. Ins. Co.,* 49 Mont. 430, Ann. Cas. 1916A, 1126, L. R. A. 1915B, 327, 143 Pac. 559, this court said: "To constitute the crime of larceny the intent which accompanies the act of taking must be the criminal intent to deprive the owner of his prop-

erty, not temporarily but permanently." (See, also, *People* v. *Brown*, 105 Cal. 66, 38 Pac. 518.)

The intent with which an act is done is a mental condition. It is often difficult of proof, and a denial of criminal intent may easily be made. Because of this, and the fact that in the majority of cases there is a more or less weak desire and intention to make return, the rule has in some jurisdictions been settled by statute. In some states the offer to return and actual return does not bar a prosecution. In others the evidence is received on the question of intent, and in some that restoration is not a defense unless made before information is filed. (20 C. J. 455, 456.)

Montana has adopted the latter rule and it is embodied in section 8658, Revised Codes. If the fact of intention to restore is no ground of defense, where the property has not been restored prior to filing information, then the correlative must be true: that the fact of intention to restore is a ground of defense where the property has been restored prior to filing information. The intention to restore must, of course, be one held in good faith; but if so, and it further appears that restoration has been made before filing complaint, then the defense is good, for the defendant had then no criminal intent and the crime was not committed.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The defendant was convicted of grand larceny, and appealed from the judgment and from an order denying him a new trial.

Paraphrased, the information charges that on December 20, 1918, the defendant, while acting as cashier of the Rosebud State Bank, and having in his possession as bailee a United States Liberty Bond, No. 673169, of the value of $500, and the property of Hugh Lynch, did feloniously appropriate the said bond to his own use, with intent to deprive the true owner of his property.

[60 Mont. 332.]

Counsel for defendant make twenty-four assignments of error predicated upon the rulings upon the admission of evidence, the giving and refusal of instructions, the refusal of the court to advise the jury to acquit, and the refusal to grant a new trial. These assignments need not be considered separately. Most of them, in one form or another, present the question of the correctness of the theory upon which the prosecution proceeded.

During the summer of 1918 the campaign was conducted throughout the country for sale of bonds of the Third Liberty Loan. The general plan of that campaign is a matter of public history, and need not be considered. In and about the town of Rosebud, subscriptions were obtained by the card system in use. Each of several subscribers indicated that he would make payment on his subscription to the Rosebud State Bank, of which institution the defendant was cashier and active manager. When these particular cards were collected, they were turned into the bank which made its subscription to the Federal Reserve Bank at Minneapolis for bonds of the denominations and in the aggregate amount corresponding to the individual subscriptions. Each subscriber to one of these cards agreed to purchase the bond, or bonds, indicated, and to pay into the Rosebud State Bank the face value thereof, either in a lump sum or by the installments authorized by the government. The bank, by its subscription, agreed likewise with the Federal Reserve Bank to purchase the bonds indicated by its subscription, and to pay therefor upon the installment plan. The bank made its several payments, and received the bonds into its custody. It is not made certain by the record whether every individual subscriber fully paid his subscription into the bank. It does appear that many of them did not pay promptly as the installments became due, and that the bank was compelled to advance the money; but for the purpose of this case we may assume that everyone met his obligations by the time the bonds were received by the Rosebud Bank.

Hugh Lynch subscribed for one $500 bond of this issue, and indicated upon his card that payment would be made therefor to the Rosebud Bank, in which institution he then had on deposit sufficient money to pay his subscription in one payment, but he did not give special directions as to the manner of payment, except that the bank was authorized to deduct from his deposit the amount or amounts necessary to discharge his subscription obligations. As a matter of fact, the bank employed the installment plan, and charged Lynch's account with deductions which in the aggregate equaled the total of his subscription, the last deduction having been made in August, 1918. On November 15, 1918, the Rosebud State Bank was indebted to the First National Bank of Miles City on an overdraft in the sum of $60,000 in round numbers, and demand was then made that it be covered at once. To this end it was agreed between the two institutions that satisfactory securities should be sent by the debtor to the creditor bank. About November 17 the Rosebud Bank, acting through this defendant as cashier, sent its three promissory notes to the Miles City Bank, one note for $17,650, to which were attached as collateral Liberty Bonds of the aggregate value of the face of the note; one note for $24,017.08, with warrants of that value attached as collateral security; and one note for $23,332.92, with bills receivable attached as collateral. The purpose of the Rosebud Bank was to secure a loan from the Miles City Bank for $65,000, pay out of this its overdraft, and leave a small credit balance in its favor. At the time these securities were forwarded, entries were made upon the books of the Rosebud Bank. The Miles City Bank's account was charged with $65,000 and bills payable credited with a like amount. Two or three days later the Miles City Bank notified the Rosebud Bank that it declined to make the loan for $65,000, but that it had applied the bonds and warrants as cash items toward the payment of the overdraft, and had retained the bills receivable as collateral for the balance, with the right in the Rosebud Bank to withdraw the bonds and

warrants at any time upon paying the face value thereof, with interest at eight per cent per annum. Some days later the Rosebud Bank's three notes were returned to it. On November 26, after receipt of a reconcilement from the Miles City Bank disclosing the then status of the Rosebud Bank's account with it, the assistant cashier of the Rosebud Bank entered upon the books of that bank a credit to the Miles City Bank's account of $23,332.92; that being the difference between $65,000 and the aggregate face value of the bonds and warrants. On December 19 or 20 defendant made entries upon the Rosebud Bank's books, as follows: The warrant account was credited with $27,469.36; the Miles City Bank's account was charged with $3,452.28—apparently the accrued interest on the warrants—and the bills payable account was charged with $24,017.08. This still left a credit of $17,650 in favor of the Rosebud Bank, but with no corresponding entries upon its books showing the proper, or any, disposition of that amount. To make up entries covering this item, the defendant at the same time charged the bills payable account with $17,650, designating opposite the entry, M. C. L. Bonds, meaning Miles City Liberty Bonds. To balance this entry, defendant credited the loans and discounts account with $9,386.71, the interest account with $238, and withdrew from the note file of the bank the note of J. F. Edgerton for $1,780, with interest due, $178; the note of C. L. Bachelor for $6,406.71; the note of McRae and Wallin for $1,200, with interest due, $60; and also credited individual deposit accounts as follows: W. J. Wallin, $5,760.78; Mrs. O. B. Jentry, $100; O. B. Jentry, $700; O. B. Jentry, $64.51, "Lumpy Jaw"; B. J. Jentry, $1,400. In May, 1919, the superintendent of banks made an official examination of the Rosebud Bank during the absence of the defendant, and at that time the Edgerton note and the McRae-Wallin note were found locked in the defendant's desk. In June, 1919, the Liberty Bonds were redeemed from the Miles City Bank, returned to the Rosebud Bank, and there-

after, upon demand, were delivered to the subscribers according to their respective subscriptions.

The information herein was filed February 11, 1920. The allegations of that information material to a determination of questions presented by these appeals are: (1) That on December 20, 1918, Hugh Lynch was the owner of Liberty Bond No. 673169; (2) that defendant then had the bond in his possession, custody, or control as bailee; and (3) that defendant then converted the bond to his own use with the felonious intent to deprive the true owner of his property. The evidence, as exhibited by the foregoing résumé, fails to prove, and does not even tend to prove, any one of these allegations.

1. Notwithstanding Lynch's testimony that on December 20, [1] 1918, he owned the particular bond No. 673169, the record discloses that he did not. When he completed payment of his subscription, he was entitled to receive one $500 bond. If there had been but one $500 bond in the lot received by the Rosebud Bank from the Federal Reserve Bank, and Lynch had been the only subscriber for a $500 bond, it might be argued with some show of reason that the delivery of that bond to the Rosebud Bank was a sufficient identification to pass title to Lynch; but the record discloses affirmatively that there was at least one other $500 bond (No. 673168) in the lot, and how many more does not appear. About June 1, 1919, after the bonds were returned from Miles City, Mr. Kennedy, the assistant cashier of the Rosebud Bank, delivered bond No. 673169 to Hugh Lynch. When, then, did title to this particular bond pass to Mr. Lynch? Section 4632 of the Revised Codes provides: "The title to personal property, sold or exchanged, passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not." So far as disclosed by this record, there never was any identification of this bond as the property of Lynch until the day it was delivered to him, six or seven months after the alleged offense was committed,

and until there was such identification, the title could not pass. (*Adlam* v. *McKnight*, 32 Mont. 349, 80 Pac. 613.)

But there is a stronger reason for our conclusion. Lynch's subscription amounted to an offer to purchase one $500 bond. The bank's subscription for the total of the individual subscriptions constituted an offer to purchase, and a promise to pay for, those bonds, which, upon acceptance by the government, became a binding contract (sec. 5084, Rev. Codes), and upon the completion of payment by the Rosebud Bank and the delivery of the bonds by the government a sale was consummated. The legal title then passed from the government to the Rosebud Bank in trust, however, for the individual subscribers to the extent of their respective subscriptions completed by payment to the bank. Notwithstanding the fact that the bank was trustee, it held the legal title to these bonds until the trust was executed by the delivery of the bonds to the individual subscribers in June, 1919, and it was in the actual possession of them until they were delivered to the Miles City Bank. Under no circumstances, therefore, can it be said that Lynch was the owner of the particular bond No. 673169 on December 20, 1918.

2. Was the defendant in his individual capacity in posses-
[2] sion of this bond as bailee? From the recital of the evidence above, it is manifest at once that the inquiry must be answered in the negative. The record discloses that the only possession which defendant ever had was by virtue of his office as cashier of the bank. The information charges that, "while acting as the cashier of the Rosebud State Bank," defendant converted this bond to his own use. The words "while acting as the cashier of the Rosebud State Bank" are meaningless in the connection in which they are employed. If it was sought to charge defendant with the larceny of this bond while in his custody by virtue of his office as cashier, under section 8656, Revised Codes, the information is insufficient in failing to allege that it came into his possession by virtue of his office. (*Moore* v. *United States*, 160 U. S. 268,

40 L. Ed. 422, 16 Sup. Ct. Rep. 294 [see, also, Rose's U. S. Notes]; *State* v. *Winstandley*, 154 Ind. 443, 57 N. E. 109.) [3] This, however, was not the theory of the state, for without objection the court instructed the jury that the prosecution was being conducted under subdivision 2, section 8642, which has to do only with the larceny of property in the possession of the defendant in his individual capacity as agent, *bailee, etc.* But neither the bank nor the defendant was a [4, 5] bailee in this instance. In bailment, the ownership is in the bailor, and the possession only in the bailee. (6 C. J. 1106.) In a trust of personal property, the legal title is in the trustee, and the possession may be in him likewise. (39 Cyc. 76.)

3. The evidence likewise fails to prove, or tend to prove, [6] that the defendant feloniously, or at all, converted this bond to his own use, or to the use of anyone else. It may be true that he was guilty of a breach of trust in pledging these bonds to the Miles City Bank as collateral security for the loan which he sought for the Rosebud Bank, and it may be equally true that the Miles City Bank was without authority to apply these bonds to a different purpose from that for which they were delivered. But these considerations are inconsequential so far as the question now presented is concerned. The evidence goes no further than to prove that the bonds were delivered to the Miles City Bank as collateral security with the intention, on the part of the Rosebud Bank and the defendant, that they should be redeemed within a short time. In *Valley Mercantile Co.* v. *St. Paul F. & M. Ins. Co.*, 49 Mont. 430, Ann. Cas. 1916A, 1126, L. R. A. 1915B, 327, 143 Pac. 559, this court said: "To constitute the crime of larceny, the intent which accompanies the act of taking must be the criminal intent to deprive the owner of his property, not temporarily, but permanently." And we also quoted with approval from *People* v. *Brown*, 105 Cal. 66, 38 Pac. 518, the following: "But the test of law to be applied to these circumstances for the purpose of determining the ultimate fact as to the man's guilt or innocence is: Did he intend to permanently

deprive the owner of his property? If he did not intend so to do, there is no felonious intent, and his acts constitute but a trespass. While the felonious intent of the party taking need not necessarily be an intention to convert the property to his own use, still it must in all cases be an intent to wholly and permanently deprive the owner thereof." Furthermore, this theory of the law is borne out by our statute. Section 8658, Revised Codes, provides: "Upon an indictment, information or complaint for larceny it is a sufficient defense that the property was appropriated openly and avowedly under a claim of title preferred in good faith, even though such claim is untenable. The fact that the defendant intended to restore the property taken is no ground of defense if it has not been restored before complaint, to a magistrate or court, charging the commission of the offense, has been made." As indicated above, these bonds were returned to the Rosebud Bank before any demand was made for them by subscribers, and several months before the information herein was filed.

Numerous errors were committed in the trial of this case which require a reversal of the judgment. We have extended our inquiry in order to determine whether a new trial should [7] be ordered. Whatever may be said in condemnation of defendant's fraudulent banking as disclosed by the record of the entries made by him after the Liberty Bonds were sent to Miles City, it is apparent that he is not guilty of the particular offense with which he is charged, and that it would be idle to direct a new trial. It is elementary that a party cannot be convicted of one offense upon an information which charges a distinct and unrelated crime.

The judgment and order are reversed, and the cause is remanded to the district court of Rosebud county, with directions to dismiss the information and discharge the defendant.

Reversed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, COOPER and GALEN concur.

UNITED STATES NATIONAL BANK OF RED LODGE, RESPONDENT, *v.* GREAT WESTERN SUGAR CO., APPELLANT.

(No. 4,247.)

(Submitted January 7, 1921. Decided February 4, 1921.)

[199 Pac. 245.]

Conversion—Chattel Mortgaged Property—Liability of Buyer—Complaint—Amendment to Conform to Proof—Agreed Statement of Facts—Waiver of Defects—Variance—Appeal—Rehearing.

Conversion—Chattel Mortgaged Property—Liability of Buyer with Notice.

1. Where a mortgage on a crop of beets was recorded in the office of the county clerk and recorder of the county in which the land on which they were to be grown was situated, a sugar company which had entered into a contract with the predecessor of the mortgagor to buy them when grown and therefore had no vested interest in them until delivery, which took place at a time when the mortgagee was entitled to their possession, had constructive notice of the mortgage and became liable to the mortgagee as for conversion.

Same—Liability of Buyer of Chattels Mortgaged.

2. A chattel mortgagee may maintain an action for conversion against the purchaser of the property upon the latter's appropriation thereof to his own use, the mortgagee having at the time the right of possession and the obligation for which the mortgage was given being unpaid.

Same—Consent to Sale—Nonliability of Buyer.

3. A chattel mortgagee who consents to the sale of the mortgaged property cannot maintain an action of conversion against the purchaser.

Same—When Mortgagee may Maintain Action Against Buyer.

4. To entitle a chattel mortgagee to maintain an action in conversion against the buyer of the mortgaged property, he must have been entitled to its possession at the time of the alleged conversion.

Pleadings—Complaint—Amendment to Conform to Proof—When Rule not Applicable.

5. The rule that the complaint may be deemed amended after trial to conform to the proof cannot be invoked where the amendment involves a change in the issues of the case and does not conform to the theory upon which it was tried.

ON REHEARING.

Trial on Agreed Statement—Waiver of Defects—Variance—Appeal.

6. Where a cause is tried on an agreed statement of facts which purports to contain all of the evidence, the pleadings become immaterial except in so far as admissions therein contained are concerned, the trial court must render judgment on the merits of the case as disclosed by such statement, and the supreme court on appeal will

affirm the judgment where under the facts as agreed plaintiff was entitled to prevail even though there was a fatal variance between the pleadings and the proof.

Appeal—Rehearing—Power of Supreme Court.

7. On rehearing the supreme court may review the entire case and correct any error that may be apparent, even though such action may not be favorable to movant.

Appeal from District Court, Yellowstone County; Charles A. Taylor, Judge.

Action by the United States National Bank of Red Lodge against the Great Western Sugar Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Messrs. Goddard & Clark, for Appellant, submitted a brief; *Mr. O. F. Goddard* argued the cause orally; *Mr. Caldwell Martin,* of Counsel.

"Agreed statements of fact are solemn admissions, resembling special verdicts, and (as with the latter) the meaning of the language in which they reach us cannot be enlarged beyond its express scope." (*Ozark Plateau Land Co.* v. *Hays,* 105 Mo. 143, 16 S. W. 957; *Koppel* v. *Mass. Brick Co.,* 192 Mass. 223, 78 N. E. 128; *Gallagher* v. *Hathaway Mfg. Co.,* 169 Mass. 578, 48 N. E. 844.) Plaintiff cannot recover unless the matters stated entitle him to a judgment as a matter of law. (*Coffin* v. *Artesian Water Co.,* 193 Mass. 274, 79 N. E. 262.) Where the agreed statement of facts does not contain facts sufficient to warrant a finding for plaintiff, the judgment must of necessity be for defendant. (*City of Boston* v. *Brooks,* 187 Mass. 286, 73 N. E. 206.)

The agreed statement of facts does not show any right of possession in the plaintiff at the time of the alleged conversion. The action in this case is one for damages for the alleged wrongful conversion of beets by the defendant, and it was incumbent upon the plaintiff to plead and to prove that it was entitled to the immediate possession of the beets at the time of the alleged conversion. "The right of possession must have been immediate, absolute and unconditional." (21 Pl. & Pr.

1041.) The complaint must show the right to immediate possession at the time of the alleged conversion. (*Sawyer* v. *Robertson,* 11 Mont. 416, 28 Pac. 456; *Paine* v. *British-Butte Min. Co.,* 41 Mont. 28, 108 Pac. 12; *Raymond* v. *Blancgrass,* 36 Mont. 449, 15 L. R. A. (n. s.) 976, 93 Pac. 648.) "Title to or a right or property in a chattel will not alone support an action in trover. It must be united with actual possession or a right to immediate possession." (38 Cyc. 2045.)

The plaintiff in such an action is limited to his title or right of possession which has been set forth in the complaint. The general rule is laid down in the case of *Gregory Point Marine R. Co.* v. *Selleck,* 43 Conn. 320, in which case the plaintiff sued in conversion and alleged a right of possession on account of a lien for labor. (See, also, *Anderson* v. *Bowles,* 44 Ark. 108; *Grier* v. *Stout,* 2 Ill. App. 602; *Hance* v. *Tillabawasse Brown Co.,* 70 Mich. 227, 38 N. W. 228; *Clendening* v. *Hawk,* 8 N. D. 419, 79 N. W. 878; *Horneffer* v. *Duress,* 13 Wis. 603.)

Further, there is nothing in the statement of facts to show that the beets were sold without the knowledge or consent of plaintiff. "Where the mortgagee sues a purchaser from the mortgagor for a wrongful conversion of the mortgaged property, the burden is on the plaintiff to show that the purchase was without his consent." (11 C. J., sec. 339, p. 265, citing *Conwell* v. *Jeger,* 21 Ind. App. 110, 51 N. E. 733.)

The agreed statement of facts does not show any unlawful conversion by the defendant.

To constitute conversion there must be either an unlawful taking in the first instance, in which case no demand is necessary, or a lawful taking followed by an unlawful withholding after demand. A purchase from one not authorized to sell may amount to an unlawful taking, but it does not appear from the pleadings or the statement of facts in this case that the defendant received the beets from anyone who was not authorized to sell or deliver them. Merely receiving the prop-

erty or acquiring it is not a conversion. (38 Cyc. 2007, 2008, 2028.)

Further, if the sale of the beets to the defendant was made with the consent of the plaintiff, there was no conversion. (*Partridge* v. *Minn. D. Elev. Co.*, 75 Minn. 496, 78 N. W. 85; Jones on Chattel Mortgages, sec. 465; 5 Am. & Eng. Ency. of Law (2d ed.), 996.)

Mr. John G. Skinner, for Respondent, submitted a brief; he and *Mr. Geo. S. Smith,* of Counsel, argued the cause orally. On rehearing *Mr. Skinner* and *Mr. George W. Pierson* submitted a brief; *Mr. Pierson* making oral argument.

The action having been commenced in May, 1916, something over a year and a half after the beets were purchased by the defendant, the trial court was justified in finding that in the natural course of handling sugar beets, the beets had been mingled with others of the company and manufactured into sugar long prior to the commencement of the action and the signing of the agreed statement of facts. An action in conversion is the proper remedy under the circumstances and facts in this proceeding. (*Harrington* v. *Stromberg-Mullin Co.*, 29 Mont. 157, 74 Pac. 413, C. J. 600, and see note 88, which cites cases from practically every state in the Union, as well as federal cases.)

There is no question but what the mortgage continued on the crop not only while it was being grown, but it was also a lien upon the crop after its severance and removal from the place grown. This is provided for in the chattel mortgage laws in force at the time of the execution of the mortgage and at the time of the purchase of the beets by the defendant. (Sec. 5773, Rev. Codes, as amended, page 382, Laws 1913.) This court has passed on the effect of filing a chattel mortgage. (See *Isbell* v. *Slette,* 52 Mont. 156, 155 Pac. 503; *First National Bank* v. *Marshall,* 51 Mont. 224, 152 Pac. 436; 5 R. C. L. 409, subd. 35; 5 R. C. L. 413, subd. 40.)

Counsel for the appellant lays considerable stress on the allegations of the complaint and the proof, and say that there is no evidence showing that the plaintiff was entitled to the immediate possession of the beets in question, for the reason that the evidence does not disclose that the beets were delivered to the defendant in Yellowstone county, as pleaded in the complaint. Conceding their argument to have merit in this respect, we submit that the mortgage provides that the mortgagee is entitled to the possession of the property in the event the mortgagor, or any other person or persons, shall remove or attempt to remove said property, or any part thereof, from said county, but it also provides that if the mortgagor shall make away with, sell or in other manner dispose of said mortgaged property, or any part thereof, then and in that event, or either of such events, the mortgagee has the right to the immediate possession of the property.

From the agreed statement it appears that the beets were delivered in the usual way, weighed and credit given therefor on the books of the Billings Sugar Company, and delivered to the company at Golden, Carbon county, Montana, and afterward paid for. This would indicate that the court would be justified from this alone in finding that the terms of the mortgage had been violated and that the plaintiff was entitled to the immediate possession of the beet crop or the value thereof. While this may show a variance between the pleadings and the agreed statement of facts, and while the record before this court might not warrant finding that the beets were in fact shipped to Billings, Yellowstone county, from Carbon county, yet we take it to be the general rule in this state that where the agreed statement of facts shows that there is a variance between the pleadings and the proof, yet if the evidence and proof is admitted without objection, the pleading will be treated as having been amended to correspond to the proof. (*Lackman* v. *Simpson,* 46 Mont. 518, 129 Pac. 325; *Archer* v. *Chicago, M. & St. P. Ry. Co.*, 41 Mont. 56, 137 Am. St. Rep. 692, 108 Pac. 571; *O'Brien* v. *Corra-Rock Island Min.*

Co., 40 Mont. 212, 105 Pac. 724; *Capital Lumber Co.* v. *Barth*, 33 Mont. 94, 81 Pac. 94.) If our contention is correct, then, of course, the argument with reference to the variance between the complaint and the agreed statement of facts will fail. Where a cause is submitted on an agreed statement of facts, the court may render judgment in accordance with what affirmatively appears in such agreed statement as to the true facts, regardless of the pleadings, or treat the pleadings as amended to cover such facts. (*Jenkins* v. *Newman*, 39 Mont. 77, 101 Pac. 625; *Hartman* v. *Smith*, 7 Mont. 19, 14 Pac. 648; *Chumasero* v. *Vial*, 3 Mont. 376; *Willard* v. *Wood*, 135 U. S. 309, 34 L. Ed. 210, 10 Sup. Ct. Rep. 831; *Saltonstall* v. *Russell*, 152 U. S. 628, 38 L. Ed. 576, 14 Sup. Ct. Rep. 733; *State Bank* v. *Norduff*, 2 Kan. App. 55, 43 Pac. 312; *Moore* v. *Philbrick*, 2 Me. 102, 52 Am. Dec. 642; *Hamilton* v. *Cook County*, 5 Ill. 519; 36 Cyc. 1288.) Where the appellate court concludes the cause should be determined on a different theory, it may order a new trial regardless of stipulations in the record. (*Chicago Title & Trust Co.* v. *O'Marr*, 18 Mont. 568, 46 Pac. 809, 47 Pac. 4.)

MR. JUSTICE REYNOLDS delivered the opinion of the court.

This action was commenced by plaintiff to recover a judgment against defendant for conversion of chattel mortgaged property. Judgment was rendered in favor of plaintiff, and defendant has appealed.

The case was submitted upon an agreed statement of facts, from which the following facts appear: On the fourteenth day of May, 1914, the defendant entered into a written contract with one C. H. Nelson, under the terms of which the latter promised to grow and deliver to defendant sugar beets to be raised on a certain twenty acres of land leased by him in Carbon county, Montana. Pursuant with the terms of the contract he planted the twenty acres to beets, but on the eighth day of September, 1914, by bill of sale, he sold

to one William Nelson his interest in his lease and beet crop, and thereupon William Nelson went into possession of the land and crop. On the sixteenth day of September, 1914, William Nelson gave to plaintiff a chattel mortgage upon the crop, which mortgage was duly acknowledged and sworn to so as to entitle it to be filed, and on the seventeenth day of September, 1914, it was filed in the office of the county clerk and recorder of Carbon county, Montana. Defendant did not have any actual notice of the transfer of the lease and crop to William Nelson nor of the giving of the mortgage from William Nelson to plaintiff. At the time of the commencement of this suit, the debt for which the mortgage was security had not been paid. After the filing of the mortgage the beet crop was delivered to defendant at Golden, Carbon county, Montana, and credit was given therefor on the books of defendant company to C. H. Nelson. Payment was made by defendant on November 15 and December 15, 1914, by its checks made payable to C. H. Nelson, Mrs. Edward Elge, lessor, and the Bridger State Bank, to which bank at one time C. H. Nelson had given a mortgage but which mortgage was paid. These checks were paid in due course. The mortgage to plaintiff provided that it should cover the crop, "whether in stack, bin, or elevator or aboard cars, in silo or at sugar factory." On November 14, 1914, plaintiff wrote a letter to defendant, inquiring about the delivery of the beets, which letter was received by defendant after mailing the November check. On November 17, 1914, plaintiff wrote defendant another letter, inquiring whether or not all the beets had been delivered and settled for.

The only question involved in this appeal is whether or not the facts as above mentioned sustain the judgment.

Inasmuch as defendant held merely an executory contract [1, 2] for the purchase of the beets in question, it had no vested interest in the beets until delivery was made to it at Golden, Carbon county, Montana. At that time a valid transfer of the crop and lease had been made to William Nelson, who had

gone into possession of same, and William Nelson had given the mortgage to plaintiff, and it had been duly filed. While defendant did not have any actual notice of the bill of sale to William Nelson and his mortgage to plaintiff, yet the facts above mentioned established constructive notice whereby defendant took possession of the beets subject to plaintiff's mortgage. There is no question whatever but that a chattel mortgagee may maintain an action of conversion against the purchaser of the mortgaged property upon such purchaser appropriating the property to his own use, the mortgagee having at the time the right of possession of the property, and the obligation for which the mortgage was given being unpaid. (*Harrington* v. *Stromberg-Mullins Co.*, 29 Mont. 157, 74 Pac. 413.)

It is urged by appellant that the facts in this particular case do not sustain the charge of conversion, for two reasons: (1) Because plaintiff consented to the sale to defendant; and (2) because the statement of facts fails to show that plaintiff was entitled to the possession of the beets at the time of the alleged conversion.

Upon the first contention, this court is unable to say, as a [3] matter of law, that the facts presented in the statement of facts show that plaintiff consented to such sale. If the plaintiff did consent to such sale, then the appropriation of the property would not be unlawful, and action of conversion could not be maintained. This is a question of fact to be submitted to the trial court.

In regard to the second contention, the complaint alleges that plaintiff was entitled to the possession of said crop at [4] the time of its appropriation by defendant for the sole reason that the chattel mortgage provided that in the event the property was removed, or attempted to be removed, from the county of Carbon, plaintiff would then be entitled to immediate possession thereof, and that the beets were shipped from the premises in Carbon county to the defendant in Yellowstone county. The statement of facts, however, fails to bear out the allegations of the complaint as to this feature of the

case. From the statement of facts it appears that the beets were delivered to the Great Western Sugar Company at Golden, Carbon county, Montana. It fails to show that the beets were shipped from that county or were otherwise removed therefrom, and thus fails to show that plaintiff was entitled to possession thereof as pleaded, which is a necessary element of plaintiff's case. (*Harrington* v. *Stromberg-Mullins Co., supra.*) This results in a fatal variance between the pleading and the proof.

Respondent suggests that, inasmuch as the chattel mortgage contains other provisions whereby plaintiff might be entitled to possession of the crop, the complaint should be deemed amended to conform with the statement of facts in these respects. The proofs referred to relate to the right of the mortgagee to take possession upon default in payment of the obligation by the mortgagor and the provision whereby the mortgagee may take possession upon a sale of the property, both of which contingencies are set forth in the statement of

[5] facts. While in some cases the complaint may be deemed amended after trial to conform to the proof, yet such rule cannot be invoked where the amendment involves a change in the issues of the case and does not conform to the theory upon which the case was tried. In this case the suggested amendment would place plaintiff's right to possession upon an entirely different basis than that claimed in the complaint, would leave the defendant without any answer to the amended complaint, and the record itself excludes the idea that the case was submitted upon the theory involved in such proposed amendment. Plaintiff therefore must stand upon his complaint as filed, as to an essential allegation of which there is an absolute failure of proof.

For the reasons above stated, the judgment will be reversed, and the cause remanded for new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES COOPER, HOLLOWAY and GALEN concur.

ON REHEARING.

(Submitted May 31, 1921. Decided June 20, 1921.)

MR. JUSTICE REYNOLDS delivered the opinion of the court.

Since this case was tried upon an agreed statement of [6] facts, defendant contends that under the rule applicable to such cases it was the duty of the trial court to apply the law to the facts and render judgment in accordance with the merits of the case as disclosed by the agreed statement of facts, and on the hearing in this court judgment should likewise be entered, or directions given for its entry, and that we should not send the case back to the trial court for a new trial. We are satisfied that this contention is sustained by the great weight of authority and that our duty in this case is to direct entry of such judgment as may be justified by the facts. (*City of Jeffersonville* v. *John Shallcross Co.*, 35 Ind. 19; *Gillett* v. *Detroit Board of Trade*, 46 Mich. 309, 9 N. W. 428; *Brown* v. *Rogers*, 61 Ind. 449; *Milk Co.* v. *Eagle Mfg. Co.*, 47 App. D. C. 191; *Benavides* v. *Benavides* (Tex. Civ. App.), 218 S. W. 566; *Hurey* v. *Leavitt*, 93 N. J. L. 299, 107 Atl. 457; *Hills* v. *Hopp*, 287 Ill. 375, 122 N. E. 510; *McGonigle* v. *Gordon*, 11 Kan. 167; *Green* v. *Prince* (Tex. Civ. App.), 201 S. W. 200; *Big Horn Lumber Co.* v. *Davis*, 14 Wyo. 455, 7 Ann. Cas. 940, 84 Pac. 900, 85 Pac. 1048; *Irvine* v. *Angus*, 93 Fed. 629, 35 C. C. A. 501; *Roberts* v. *Corbin*, 28 Iowa, 355; *Allen* v. *St. Louis National Bank*, 120 U. S. 20, 30 L. Ed. 573, 7 Sup. Ct. Rep. 460; *Churchill* v. *Buck*, 102 Fed. 38, 42 C. C. A. 148; *Hatfield* v. *Cabell County Court*, 75 W. Va. 595, 84 S. E. 335; 3 Cyc. 451, notes 5 and 6.)

On rehearing it is the prerogative of this court to review [7] the entire case and correct any error that may be apparent, even though such action may not be favorable to

the movant. Respondent contends that it was an error on the part of this court in holding in its original opinion that there was a fatal variance between the pleadings and the proof. This contention is based upon the proposition that, in a case in which an agreed statement of facts is made and such agreed statement of facts purports to contain all of the evidence, the pleadings become immaterial, except in so far as admissions therein contained are concerned. We deem this contention of merit; for, after the parties to an action have agreed upon all the facts involved in the case, the plaintiff or defendant, as the case may be, is entitled to such judgment as the agreed statement of facts may disclose. (*West Roxbury* v. *Minot*, 114 Mass. 546; *State Bank* v. *Norduff*, 2 Kan. App. 55, 43 Pac. 312; *Willard* v. *Wood*, 135 U. S. 309, 34 L. Ed. 210, 10 Sup. Ct. Rep. 831; *Saltonstall* v. *Russell*, 152 U. S. 628, 38 L. Ed. 576, 14 Sup. Ct. Rep. 733; *Esty* v. *Currier*, 98 Mass. 500; *Scudder* v. *Worster*, 11 Cush. (Mass.) 573.) A few excerpts from the cited cases will clearly disclose the attitude of the various courts upon this proposition:

"Upon an agreed statement of facts, the only question open is whether the plaintiffs can recover upon any form of declaration or in any form of action." (*West Roxbury* v. *Minot*, 114 Mass. 546.)

"The first specification of error is that the petition does not state facts sufficient to constitute a cause of action against plaintiffs in error, and this question is raised in this court for the first time. No objection, either by demurrer or otherwise, was taken in the court below. We do not consider that, under the pleadings in this case, and the fact that the case was tried to the court upon an agreed statement of facts, plaintiffs in error are now in a position to raise this question. The objection now raised is to the form of the petition alone, and all the subsequent pleadings, and the action of the parties in the trial of the cause, were upon the theory that the petition was sufficient. Undoubtedly, after the submission of the case to the court upon the agreed statement of facts,

an amendment would have been permitted if the attention of the trial court had been directed to the alleged defect, and it cannot be claimed that the defendants would have been in any manner prejudiced by such amendment. Such being the case, we feel that this court should treat the record as if such amendment was in fact made, and that the judgment ought not to be disturbed for this alleged error. *Railroad Co.* v. *Caldwell,* 8 Kan. 244; *Pape* v. *Bank,* 20 Kan. 440." (*State Bank* v. *Norduff,* 2 Kan. App. 55, 43 Pac. 312.)

"A statement of facts agreed by the parties, or, technically speaking, a case stated, in an action at law, doubtless waives all questions of pleading, or of form of action, which might have been cured by amendment." (*Willard* v. *Wood,* 135 U. S. 309, 34 L. Ed. 210, 10 Sup. Ct. Rep. 831.)

"A case having been submitted to the circuit court upon a statement of facts agreed by the parties, or case stated, upon which the court was to render such judgment as the law required, all questions of the sufficiency of the pleadings were waived, and the want of an answer was immaterial." (*Saltonstall* v. *Russell,* 152 U. S. 628, 38 L. Ed. 576, 14 Sup. Ct. Rep. 733.)

"But an agreed statement of facts waives all defects in the pleadings, even if the pleadings are referred to as part of the statement, and authorizes such a judgment on the merits as if they were duly presented by proper pleadings." (*Esty* v. *Currier,* 98 Mass. 500.)

"The first question presented, that of proper pleadings and specification of defense, would have been more properly raised had the case taken the ordinary course of a trial by jury. By making a statement of facts, and asking the judgment of this court thereon, the parties are understood to have waived all questions as to the formal pleadings, unless those questions are in direct terms reserved." (*Scudder* v. *Worster,* 11 Cush. (Mass.) 573.)

The question, then, to be determined by this court is whether or not, upon the agreed statement of facts, plaintiff

is entitled to recover, regardless of the pleadings. In the original opinion we held that plaintiff could not recover because it did not appear from the agreed statement of facts that the crop in question had been removed from Carbon county, and that therefore plaintiff was entitled as mortgagee to the possession thereof. The mortgage, which is made a part of the agreed statement of facts, discloses that there were other contingencies upon the happening of which plaintiff would become entitled to the immediate possession of the crop, among which are included such instances as the making of a claim on the crop by any other person or persons, any disposition of the crop, or the harvesting of the crop. The agreed statement of facts shows the existence of each of the three grounds of right to possession above mentioned, and therefore the agreed statement of facts does show upon its face that plaintiff was entitled to the possession of the crop. This supplies the defect in plaintiff's case due to variance between pleading and proof, as pointed out in the original opinion, and completes plaintiff's right of action.

In the original opinion, in discussion of proposed amendment, we stated that the record itself excludes the idea that the case was submitted on the theory involved in such proposed amendment. In that expression we had reference to the theory of the case as disclosed by the pleadings. In looking at the matter upon the basis of the theory of the case as disclosed by the agreed statement of facts, our conclusion is necessarily different from what it would be in reaching a result based upon the theory involved in the pleadings. We are therefore of the opinion that, upon the agreed statement of facts, plaintiff is entitled to recover in this action.

The order heretofore entered in this case is overruled, and it is ordered that the judgment be affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES COOPER, HOLLOWAY and GALEN concur.

STATE, RESPONDENT, v. BENNETT, APPELLANT.

(No. 4,613.)

(Submitted June 1, 1921. Decided June 20, 1921.)

[199 Pac. 276.]

Criminal Law—Arson—Circumstantial Evidence—Sufficiency—Motive—Stenographers — Evidence—New Trial — Newly Discovered Evidence—Insufficient Affidavits.

Arson—Evidence—Admissions—Stenographer's Notes—Portions Only Admitted—When not Reversible Error.

1. Where, in a prosecution for arson, portions of the testimony of a stenographer given from notes taken in the county attorney's office relating to admissions made by defendant, were admitted in evidence over objection of defendant that all of it should be introduced, his counsel, after cross-examination of the witness at length, refused to have it all made a part of the record at the suggestion of the court and the county attorney, he was in no position to complain.

Same—Circumstantial Evidence—Sufficiency.

2. In a prosecution for arson, evidence, circumstantial in character, which showed that defendant had insured the property in the building used for business and living purposes; had sent his family to the country a few days before the fire and removed several boxes of family belongings; was in the building a very short time before the fire was discovered in three different places where piles of excelsior and other inflammatory material had been prepared, *held* sufficient to justify conviction, under the rule that on circumstantial evidence conviction cannot be had unless all the circumstances are consistent with each other and with the hypothesis of guilt, and inconsistent with any other rational hypothesis.

Same—Motive—Direct Proof not Necessary.

3. Motive for the commission of crime need not be proved directly by the prosecution, but may be inferred from attendant and surrounding circumstances, and from previous occurrences referring to and connected with the commission of the offense.

Same—New Trial—Newly Discovered Evidence—Affidavits—Insufficiency.

4. Affidavits in support of a motion for new trial on the ground of newly discovered evidence will not be considered, where it is not shown that the matters therein contained were not discovered and known by defendant before the conclusion of the trial.

Appeals from District Court, Musselshell County; George P. Jones, Judge.

---

1. Stenographer's notes as evidence, see note in 81 Am. St. Rep. 358.

[60 Mont. 355.]

VAUGHN Q. BENNETT was convicted of arson, and from the judgment, and an order denying a new trial, he appeals. Affirmed.

Messrs. Jeffries & McNaught, for Appellant, submitted a brief; *Mr. G. J. Jeffries* argued the cause orally.

Prejudicial error was committed in admitting the testimony of the witness Hafner. The testimony of the witness Hafner consisted of excerpts read from a written statement, and it was error to permit any part of the said statement to be introduced in evidence. There is no testimony whatever to show that an accurate transcript was made of the conversation. It was not even contended by the state that the written statement was the complete conversation held at the county attorney's office. The questions propounded to Bennett were not included in the written statement at all. While defendant's counsel was permitted to interrogate the witness as to that part of the statement which was not introduced by the state, the damage had been done. The jury could not receive an impartial impression from a part of the conversation; if it were intended they should do so, and that their verdict should be based on all the evidence available, then in typewritten form and in the hands of the witness, why should counsel suppress a part of it? The admission of this evidence, introduced in the manner it was, we submit, was highly prejudicial to the defendant. "The conversation containing the admissions by accused, must be considered by the jury in its entirety." (16 C. J. 635.) "The admission, in a conversation or document, by the defendant, of a fact disadvantageous to himself, will not be received without receiving at the same time all such other parts of such conversation or document, whether emanating from himself or from another, as may tend to explain or qualify the part first given. The whole relevant context is in such case to be left to the jury, who are to say whether the facts asserted by the defendant in

his favor are true." (Sec. 688, Wharton's Criminal Evidence, p. 1416; see, also, 1 Greenleaf on Evidence, 218.)

The evidence wholly fails to support the verdict, in that the state has failed to show any motive for the commission of the crime and has failed to introduce evidence sufficient to prove to the mind of a reasonable man, beyond a reasonable doubt, that the defendant and no one else committed the crime. (*State* v. *Mullins*, 55 Mont. 95, 173 Pac. 788; *State* v. *Chevigny*, 48 Mont. 382, 138 Pac. 257; *State* v. *Sieff*, 54 Mont. 165, 168 Pac. 524; *Falk* v. *State*, 182 Ind. 317, 106 N. E. 354; *Dunn* v. *People*, 158 Ill. 58, 42 N. E. 47.)

Mr. S. C. Ford, Attorney General, and *Mr. Frank Woody*, Assistant Attorney General, for Respondent, submitted a brief; *Mr. L. A. Foot*, Assistant Attorney General, argued the cause orally.

Counsel argue that it was necessary for the state to introduce direct evidence for the purpose of proving motive. It was not incumbent upon the state to introduce direct evidence for this purpose (16 C. J. 529). Where the defendant is shown to be the criminal, motive is immaterial. (*Id.* 547.) And motive may be inferred from the facts in evidence, and the facts supplying the motive may be adduced in connection with other evidence in the case. (2 Wharton on Criminal Evidence, 1649.) On a charge of arson it is relevant to show that the accused insured the property, or that the securing of the insurance money was his motive. (*Id.* 1650.) And it is always relevant for the state to show a pecuniary motive on the part of the accused, and in support of this it may show that he held a policy of insurance on the building, or on goods in the building at the time of the fire. (*Id.* 1677.) Here the state introduced testimony showing the occupancy of the building by the defendant, that he had certain property therein, that he had insurance on such property, and evidence showing that the defendant burned the building. When this evidence was introduced it was sufficient to show

motive, without any direct evidence being introduced for solely such purpose.

MR. COMMISSIONER JACKSON prepared the opinion for the court.

Defendant, convicted of the crime of arson, appeals from the judgment and the order denying motion for a new trial.

On March 12, 1919, the defendant entered into a written lease, by the terms of which, on or about April 1, 1919, he went into possession of a two-room structure in the city of Roundup and built two additional rooms to the building, the back one of which was apparently a shed covering an ice-box. He used the place as a butcher-shop and dwelling. He insured the stock and household and shop furniture for one year in the sum of $1,000, on April 29, 1919, $250 of which was on meats and provisions, $500 on office and shop fixtures, and $250 on his household goods and personal effects. Some time in the following June he informed the insurance agent that he was going to discontinue selling merchandise during the hot weather, but would open up again. The agent did not cancel the policy, but informed defendant it had no force as far as the meats and provisions were concerned. About the 1st of June, 1919, defendant went to work in a pool-hall; his wife tending the business of selling out his remaining stock. He and his family continued to live on the premises until about August 3, when his family went to the country and the defendant continued to sleep at the house. On the 5th or 6th of August, he sent away from his house several boxes of family belongings and on the evening of August 9 arranged with one Brown to take him in an automobile to the country to visit with his wife and family. At midnight of that day he closed the pool-hall where he had been working, and some time thereafter, together with Brown, drove to his home, arriving there some time around 12:30. With respect to the hour of arrival there is some conflict between prior admissions made by the defendant and his testimony at the trial, but the jury

evidently fixed it at 12:30, or close thereto. At his home they entered the back door, Brown taking out a bicycle and defendant a grip, and as he was following Brown through to the back room, "thinking of some cigars he had," he went back to another room to get them. He then shut and locked the door, going to the car with Brown. They rode for a distance of ten blocks to what is known as the Morton shack, where they were joined by defendant's father. At about this time the fire-alarm sounded, and the defendant told Brown that every time he heard the fire whistle blow he felt as though something of his was on fire. Brown, the defendant, and his father went on to the Morton ranch in the country, and on the afternoon of August 10 defendant stated he first heard of the fire and returned with "the first party that came to town."

At about 12:45 A. M., approximately fifteen minutes after defendant had locked and left the building, it was burning in three different places—one fire being in a small closet in the rear of an unused range, another behind a gasoline stove in the same room, and the third in the second room from the front, under and behind a dresser. These fires were unquestionably of incendiary origin, piles of excelsior, sticks, *etc.*, being used, and had been burning about fifteen minutes when the fire chief arrived.

There is some sharp conflict in the record as to the value of the property in the building, but that was for the jury.

Defendant's actions on the night in question were put in [1] evidence by voluntary admissions made by him on two different occasions, when he was not in custody and no prosecution had been instituted. This evidence was given by several witnesses without objection, until the witness Kathryn Hafner, stenographer to the county attorney, was called. Over objection by defendant, she was permitted to refresh her memory as to admissions made by the defendant from notes written by her at the time the admissions were made in the office of the county attorney.

Defendant's brief fails to set out the specifications of error relied on, except specification No. 1, which relates wholly to the overruling of the objection to the introduction of the evidence of the witness Hafner. His argument is based on the theory that but part of the conversation was related, when it all should have been submitted. The record shows that counsel for defendant cross-examined the witness at length from her memoranda; that the court and county attorney suggested it all be made a part of the record; and if all of the conversation was not testified to by the witness, defendant cannot complain, by reason of the refusal on the part of his counsel to place it all in the record. Defendant later took the stand, and in all material details corroborated the testimony of the three witnesses who had already told of his admissions. That the testimony of the witness Hafner was admissible cannot be questioned. (Sec. 8020, Rev. Codes; *Marron* v. *Great Northern Ry. Co.*, 46 Mont. 593, 129 Pac. 1055.)

There is nothing to show to what specifications 2, 3, 4 and 5 [2] refer, save the argument of the defendant, and from that it appears he complains of the insufficiency of the evidence, want of motive and newly discovered evidence. It is true the evidence is circumstantial, but it shows that defendant occupied the building; had insured the property therein; moved his family to the country shortly before the fire; sent away several boxes of personal belongings; was in the building within a very short time before the fire was discovered; when he left, the house was vacant and the doors were all locked except that of the shed; and that the fires were incendiary. He could not have visited those rooms as he did, and not have seen the prepared piles of excelsior and rubbish. "All the circumstances proved must be consistent with each other and with the hypothesis that the accused is guilty, and at the same time inconsistent with any other rational hypothesis." (*State* v. *Suitor*, 43 Mont. 31, Ann. Cas. 1912C, 230, 114 Pac. 116.)

Every circumstance points unerringly to the guilt of the defendant, and in our opinion the proof is inconsistent with any other rational hypothesis. The unexplained evidence of the state is sufficient to sustain the verdict and judgment, and as to whether or not the evidence of the defendant explained that of the state was a matter for the jury, which determined by its verdict that the defendant was guilty. It is not necessary [3] that the state directly prove a motive. (*State* v. *Lucey*, 24 Mont. 295, 61 Pac. 994; *State* v. *Suitor, supra.*) "Motive is an inferential fact, and may be inferred, not merely from attendant and surrounding circumstances, but, in conjunction with these, from all previous occurrences having reference to and connected with the commission of the offense." (8 R. C. L. 182; 16 C. J. 529; 2 Wharton on Criminal Evidence, 1649, 1650, 1677.)

To support the ground of newly discovered evidence, de- [4] fendant filed five affidavits. There is nothing to show that the matters contained therein were not discovered and not known by defendant and his counsel before the conclusion of the trial. Therefore they cannot be considered.

The state in its brief has urged the dismissal of the appeal on various technical grounds, which might have been sustained; but we prefer to treat the case on its merits. For the reasons herein stated, we recommend that the judgment and the order appealed from be affirmed.

PER CURIAM: For the reasons given in the foregoing opinion, it is ordered that the judgment and order appealed from be affirmed.

Affirmed.

Rehearing denied September 6, 1921.

STATE, RESPONDENT, *v.* BONNING, APPELLANT.

(No. 4,648).

(Submitted June 2, 1921. Decided June 20, 1921.)

[199 Pac. 274.]

Criminal Law—Receiving Stolen Property—Flight of Defendant—Evidence—Admissibility — Erroneous Instruction — Assumption of Guilt—Appeal and Error—Briefs.

Criminal Law—Flight of Defendant—Erroneous Instruction—Assumption of Guilt.

1. In a prosecution for receiving stolen property the undisputed evidence in which showed that the property was received by defendant and no one else, an instruction that if the jury believed from the evidence beyond a reasonable doubt that after the commission of a crime with which he was charged he fled, the fact of his flight might be taken into consideration in determining his guilt or innocence of the charge against him, was prejudicial as assuming the commission of the offense and thus the guilt of defendant.

Same—Flight of Defendant—Admissibility of Evidence—Exception to Rule.

2. Evidence of flight or concealment of one charged with crime is, generally, evidence of guilt and admissible; but where the accused fled while under a charge entirely different from the one for which he was on trial, evidence of his flight was inadmissible.

Same—Flight of Defendant—Evidence—Admissibility—When Exception to Rule not Applicable.

3. Where defendant fled while under a charge of larceny, evidence of his flight was admissible in a prosecution under an information charging him with receiving the same property knowing it to have been stolen, the facts involved having been the same and the only difference in the two charges one in the statement of defendant's relation to such facts.

Briefs—Specifications of Error—Admission or Rejection of Evidence—Rules.

4. Where error is assigned to the admission or rejection of evidence, the specification must quote the full substance of the evidence admitted or rejected. (Supreme Court Rules, Rule X, subd. C.)

Appeals from District Court, Beaverhead County; Jos. C. Smith, Judge.

WILLIAM T. BONNING was convicted of receiving stolen property, and from the judgment of conviction and an order denying him a new trial, he appeals. Reversed and remanded.

---

2. For authorities discussing the question as to whether flight creates a presumption of guilt, see notes in 39 L. R. A. (n. s.) 58; 18 Ann. Cas. 901.

Mr. John Collins, for Appellant, submitted a brief and argued the cause orally.

Mr. S. C. Ford, Attorney General, and *Mr. Otto A. Gerth*, Assistant Attorney General, submitted a brief; *Mr. L. A. Foot*, Assistant Attorney General, argued the cause orally.

MR. JUSTICE REYNOLDS delivered the opinion of the court.

Defendant was convicted of the charge of receiving stolen property knowing the same to have been stolen. Motion for new trial was made and overruled. Defendant appeals from the judgment and order overruling motion for new trial.

In July, 1919, defendant conducted a store and butcher-shop at Wisdom, in Beaverhead county. On or about the twelfth day of that month he received from one Williamson the carcass of a heifer. It was contended by the state that Williamson stole the animal from Spokane Cattle Company, dressed it, and delivered it to defendant at Wisdom in pursuance of a previous agreement between defendant and Williamson. Williamson and one Wilkinson, who assisted him, were charged with grand larceny, pleaded guilty, and were sentenced to the state penitentiary. Shortly after the delivery of the carcass to defendant he also was charged with the larceny. He was admitted to bail, and while released on bail he fled from Montana to Milwaukee, where he was found living under an assumed name and was brought back to Montana. In October, 1919, the information upon which he was tried and convicted was filed with the understanding that the charge of larceny should be abandoned.

One of the assignments is that the court erred in giving to [1] the jury the following instruction: "You are instructed that the flight of a person after a crime has been committed or after the commission of a crime with which he is charged is a circumstance tending to establish his guilt, not sufficient of itself to establish it, but a circumstance which you may take

into consideration in considering whether he is guilty as charged; and if you believe from the evidence beyond a reasonable doubt that the defendant, after a crime has been committed or after the commission of a crime with which he is charged, fled from the state and tried to avoid arrest and apprehension, then you may take this fact into consideration in determining the defendant's guilt or innocence of the crime charged in the information." At the time the instruction was offered objection to it was made in behalf of defendant for the following reasons: (1) Because this instruction assumes that the crime charged has actually been committed; (2) it assumes that said crime has been committed by the defendant; (3) this instruction is not warranted by any competent testimony or evidence contained in the record herein.

In the latter part of the instruction the jury is told that, if it believes from the evidence beyond a reasonable doubt that the defendant, after the commission of the crime with which he is charged, fled from the state, then such fact may be taken into consideration in determining defendant's guilt or innocence of the crime charged. Paraphrased, this is equivalent to instructing the jury that, if it believes from the evidence beyond a reasonable doubt that the defendant, after he received the stolen property, knowing it to have been stolen, fled, then such fact may be taken into consideration in determining the guilt or innocence of defendant of the charge of receiving stolen property. The instruction assumes the commission of the crime charged in the information. If the crime charged in the information was one which could have been committed by any one of a large number of persons, and its commission had been established beyond question, then the evil of such instruction would have been insignificant and probably would have resulted in no prejudice, but, when applied to the facts of this particular case, the result is different. The undisputed evidence shows that the carcass was received by defendant, and the charge in the complaint is that defendant received stolen property. The conclusion necessarily is

that, if the crime charged in the information was committed, it must have been committed by defendant and no one else, and therefore the court, when it assumes the commission of the offense charged in the information, is assuming the guilt of the accused, in which assumption the court can never indulge, in instructing the jury. This is in direct violation of the elementary principle that the accused shall be presumed to be innocent until proven guilty. The instruction is clearly erroneous, and, as we view it, could not fail to have prejudiced the jury against defendant.

It is urged that the instruction is not warranted by compe-
[2] tent evidence, reference being made to evidence given as to the flight of defendant while out on bail pending the charge against him of grand larceny. It is insisted that this evidence was inadmissible for the reason that "flight in respect to another and different offense is not to be considered as evidence of the guilt of an offense from which there was no flight." (16 C. J. 552, par. 1066; see, also, *Damron* v. *State*, 58 Tex. Crim. 255, 125 S. W. 396.) As a general proposition, evidence of flight and concealment is admissible as indicating the guilty conscience of the accused; and its value as such evidence lies in the knowledge of the culprit that he has committed an offense and in his fear of apprehension. (*State* v. *Lucey*, 24 Mont. 295, 61 Pac. 994; *State* v. *Paisley*, 36 Mont. 237, 92 Pac. 566.) A guilty conscience alone will frequently drive a person from the scene of his crime, for, as the Scriptures say, "The wicked flee when no man pursueth." Such act being a natural result of the guilty conscience, evidence of such act is evidence of the guilt of the accused. From this analysis of the reasons for the admissibility of such evidence, the force of the rule that evidence of flight because of one crime cannot be considered on the trial of another and entirely different offense is apparent, as in such case the flight does not disclose any guilty conscience in regard to the offense in question. For illustration: If a man has committed murder and has fled from the state on account thereof, such flight would not be admissible in evidence against him upon a charge of lar-

ceny entirely disconnected and unrelated to the murder. But [3] in this case the maxim, "When the reason of a rule ceases, so should the rule itself," is applicable. The reason of the rule ceases when the difference in the charge is merely in the statement of defendant's relation to the facts; the facts involved being the same. To carry the illustration above given a little further: If a man, having fled from the charge of murder, is afterward apprehended and the charge changed from murder to manslaughter involving the same facts, then the evidence of flight would be just as material and just as indicative of guilt upon the latter charge as upon the former. Thus in this case, while technically the first charge was for a different offense than that upon which defendant was tried and convicted, yet the difference in the charges is merely a difference in the statement of defendant's relation to the facts; the facts in each case being the same. His flight after the charge of larceny would indicate the same mind toward the affair as it would if he had fled after the charge had been changed to one for receiving stolen property. For these reasons, we believe that the evidence given as to the flight of the defendant was competent, and no error was committed by the court in reception of the same.

A number of other errors are assigned, but we find no merit in defendant's contentions in regard thereto, although it is noticeable in the record that E. N. Jones, manager of the Spokane Cattle Company, was not examined as a witness nor his absence explained. We wish also to call attention to the [4] fact that the assignments of error as to admission of evidence do not comply with rule X, subdivision 3b (53 Mont. xxxvi, 167 Pac. x). We must insist that attorneys, in presenting questions of this kind, observe the rule.

The judgment and order overruling motion for a new trial are reversed and the cause is remanded for new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES COOPER, HOLLOWAY and GALEN concur.

STATE, RESPONDENT, v. EVANS, APPELLANT.

(No. 4,448.)

(Submitted May 31, 1921. Decided June 20, 1921.)

[199 Pac. 440.]

Criminal Law—Grand Larceny—Possession of Stolen Property—Inferences—Instructions—Appeal and Error.

Grand Larceny—Possession of Recently Stolen Property.

1. While mere possession of recently stolen property is not sufficient to justify conviction for larceny, such fact, supplemented by others inconsistent with the idea that the possession is honest, makes a case sufficient to submit to the jury.

Same—Possession of Recently Stolen Property—Sufficiency of Case to Go to Jury.

2. In the absence of direct and positive evidence that defendant stole a steer with the larceny of which he was charged, his possession of the meat of the animal and his exercise of ownership over it, under circumstances indicating knowledge of where the animal came from, furnished a basis for the inference that he killed it, sufficient to justify submission of the case to the jury.

Appeal and Error—Instructions—When not Reviewable.

3. Under section 9271, Revised Codes, only those instructions to which objection was made at the time of settlement can be considered on appeal.

Trial—Instructions must Relate to Facts.

4. Instructions to the jury must relate to the facts given in evidence in the particular case.

Grand Larceny—Recently Stolen Property—Burden of Proof.

5. In a prosecution for grand larceny, an instruction on the effect of possession of stolen property, which did not charge that, if defendant's explanation raised a reasonable doubt, the burden was on the state to prove the falsity thereof, was not erroneous, in view of other instructions meeting such objection, which were not objected to.

Same—Reasonable Doubt—Improper Instruction.

6. An instruction that where the evidence shows that the property charged to have been stolen was stolen by someone, and that the defendant was recently in possession of it, it is wholly immaterial how strong the state's case may be, he cannot be convicted if the evidence offered by him is sufficient to raise a reasonable doubt of his guilt, though the explanation may not be reasonable, probable, satisfactory or true, was properly refused, the substance thereof having been covered by other instructions, and the form of it objectionable.

Same—Instructions—Proper Refusal When Subject Covered by Other Instructions.

7. The refusal of an instruction in a larceny case that there must be, in addition to proof of possession of the stolen property, proof

---

1. On possession of recently stolen property as evidence of larceny, see note in 12 L. R. A. (n. s.) 199.

[60 Mont. 367.]

of corroborating circumstances tending of themselves to establish guilt, was not error, the court having charged the jury that mere possession of such property was not sufficient to justify conviction, and that, in addition to personal and exclusive possession involving a distinct and conscious assertion of property rights by defendant, there must be other evidence.

Appeal from District Court, Sheridan County; John Hurly, Judge.

CHARLES EVANS was convicted of grand larceny, and he appeals. Affirmed.

Messrs. Babcock & Ellery, for Appellant, submitted a brief; *Mr. Paul Babcock* argued the cause orally.

In *State* v. *Trosper*, 41 Mont. 442, 109 Pac. 858, this court held that where the state is endeavoring to convict largely by showing possession of recently stolen property it must establish (1) that the property was stolen by someone, and (2) that the defendant was recently in possession of it. In *Territory* v. *Doyle*, 7 Mont. 245, 14 Pac. 671, *State* v. *Sullivan*, 9 Mont. 174, 22 Pac. 1088, and *State* v. *Willette*, 46 Mont. 326, 127 Pac. 1013, the court held that the possession of property by the defendant soon after it had been stolen is not sufficient of itself to justify his conviction, but that there must be other circumstances outside of, and independent of, the possession of the property tending to show that the possession is felonious. (See, also, *People* v. *Horton*, 7 Cal. App. 34, 93 Pac. 382.) Under the Montana cases, where the state seeks a conviction primarily by showing possession of recently stolen property, the state must establish (1) that the property is stolen property and (2) that the defendant was recently in possession of it; and (3) proof of corroborating circumstances tending of themselves to establish guilt. In giving instruction No. 7, the court removed at least two of the three elements of fact from the jury, for in it the court assumed as a fact that the property described in the information was recently stolen and that the same came into the possession of the defendant. The court in assuming in this

instruction that the property described in the information was recently stolen property and that the same had come into the possession of the defendant invaded the province of the jury, and erred to the prejudice of the defendant. (*State* v. *Allen*, 34 Mont. 403, 87 Pac. 177; *Lujan* v. *State*, 16 Ariz. 123, 141 Pac. 706; *State* v. *Lewis*, 56 Kan. 374, 43 Pac. 265; *People* v. *Lang*, 104 Cal. 363, 37 Pac. 1031; *Heivner* v. *People*, 7 Colo. App. 458, 43 Pac. 1047; *State* v. *Mackey*, 12 Or. 154, 6 Pac. 648.) The defendant's specification of error No. 5 relates to the court's refusing to give defendant's requested instruction No. 3 and in giving in lieu thereof the court's instruction No. 5. The defendant's requested instruction No. 3 and the court's instruction No. 5 are identical, save that the court refused to give the last clause of defendant's requested instruction No. 3. This clause is: "There must be in addition to proof of possession of stolen property proof of corroborating circumstances tending of themselves to establish guilt." In *Territory* v. *Doyle*, *State* v. *Sullivan*, *supra*, and in *State* v. *Willette*, *supra*, this court held that the possession of property by the defendant soon after it had been stolen is not sufficient of itself to justify a conviction, but there must be other circumstances outside of, and independent of, the possession of the property tending to show that the possession is felonious. The supreme court of California has adopted a similar rule. The defendant's requested instruction No. 2 was approved in the case of *People* v. *Horton*, *supra*. Under the former decisions of this court, the court should have given the instruction requested by the defendant.

The verdict is contrary to the evidence. The state at the trial put great reliance upon the case of *State* v. *Kneeland*, 39 Mont. 506, 104 Pac. 513. In that case the state's evidence established on the part of the defendants personal and exclusive possession of recently stolen property, and possession which necessarily involved a distinct and conscious assertion of property rights therein. The evidence also established clear, specific and unqualified admissions on the part of the defend-

ant that he had killed the animals. In the case at bar, the record does not establish the personal and exclusive possession by the defendant of the steer described in the information or of the butchered carcass of the steer described in the information, and there is nowhere in the record one scintilla of evidence tending in any way to show an admission on the part of the defendant that he killed the steer. Even a superficial examination of the Kneeland case will establish this distinction. This court has repeatedly held that when a conviction is sought upon circumstantial evidence, the proof must be such as not only to authorize a belief in the guilt of the accused, but also to exclude every other reasonable hypothesis. Granting for the purpose of argument, as this court stated in the case of *State* v. *Mullins,* 55 Mont. 95, 173 Pac. 788, that the conjectures, the suspicions and probabilities are all that the defendant did feloniously kill the steer described in the information, still the defendant may not be convicted on conjectures, however shrewd, or suspicions, however justified, or probabilities, however strong, but only upon evidence that establishes guilt beyond a reasonable doubt; that is, upon proof such as to legally sustain the conviction that the charge is true. (*State* v. *Postal Telegraph & Cable Co.,* 53 Mont. 104, 161 Pac. 953; *State* v. *Seiff,* 54 Mont. 165, 168 Pac. 524; *State* v. *Taylor,* 51 Mont. 387, 153 Pac. 275; *State* v. *Suitor,* 43 Mont. 31, Ann. Cas. 1912C, 230, 114 Pac. 112; *State* v. *Seymour,* 7 Idaho, 548, 61 Pac. 1033.)

Mr. S. C. Ford, Attorney General, and *Mr. Otto A. Gerth,* for Respondent, submitted a brief; *Mr. L. A. Foot,* Assistant Attorney General, argued the cause orally.

MR. CHIEF COMMISSIONER POORMAN prepared the opinion for the court.

This is an appeal from the judgment entered upon a verdict finding the defendant guilty of the crime of grand larceny and from the order of the court overruling the defend-

ant's motion for a new trial. The information charges that the defendant, on or about the thirtieth day of September, 1917, committed the crime of grand larceny by the stealing of a certain black steer, then the property of one Sam Falkinburg.

The errors assigned relate to the sufficiency of the evidence to sustain the verdict and to the action of the court in refusing instructions offered by the defendant, and also in giving certain instructions to the jury. The question relating to the sufficiency of the evidence has necessitated the critical examination of the entire record.

The state's evidence tends to show that the animal described in the information was owned by Falkinburg, and was in his field on the twenty-ninth day of September, 1917; that he missed the animal on the following day, and in his search therefor met the defendant, and asked him if he had seen the animal, and the defendant answered, "No," and asked Falkinburg if he had looked around the Y, meaning the Y track used by the railroad. Two days later defendant said to Lou Gridley in Bainville, where he was then working: "I got some beef out there. I killed a beef. There is some beef out there. It is getting warm and going to spoil, and you and Roy can have a quarter apiece." Witness qualified his testimony by saying he was not positive that defendant used the words: "I killed a beef," but he did say something to the effect that he had some beef out there. That evening Gridley and defendant went to the Evans ranch, where they found the beef covered with weeds, in the bottom of a ravine several hundred feet from defendant's house. They loaded three quarters on the car, but after going some distance one quarter was thrown off, because of the load being too heavy. One of the quarters taken was retained by Gridley, and the other was delivered to Roy Evans. Similar statements were made by defendant to Roy Evans, and also to Thomas Quinn, who went with defendant and got one quarter of the beef, which was in the same condition as that delivered to Gridley.

[60 Mont. 367.]

On October 3, defendant met Falkinburg at Bainville, and asked him if he had found his steer. Falkinburg replied that he had not, and then told defendant that he, Evans had been seen driving the steer away at 2 o'clock in the morning, and if defendant would tell him which way he drove the animal, he, Falkinburg, would go and get it. Defendant then said, "You can't get that steer * * * because he is dead," and accused "two hoboes in town" with killing him. Defendant was informed by Charles Council, deputy sheriff, that, to convict the men whom defendant had accused, it would be necessary to have more of the meat or the hide, and offered to go with defendant to get them, but defendant said: "No, I don't want you or Sam Falkinburg to go along, as the people out there will get suspicious, and I can't get the meat."

Herbert Ditmer, an auto driver, was then engaged to go with defendant. On their return defendant stated that someone had stolen the hide, but he brought back the head, which he recognized as the head of the Falkinburg steer. Ditmer testified: "When we got to the creek bottom, Evans got out, We walked to the north about two rods. We went into this creek bottom, and he showed me a little hole, and told me to uncover it, and I did. It seemed to be an old badger hole, about a foot wide and two feet long. It was covered with dry grass. When I uncovered it, I found the head of a black steer." On the next day, defendant and Ditmer went back to the Evans ranch, and by direction of defendant Ditmer found one quarter of the beef covered with hay or weeds, and about one-half mile from where they found the head the day before. The deputy sheriff and Falkinburg then went to the Evans ranch, and found where the animal had been killed, found the entrails, and there found the hide stretched on the ground, hair side up, and not covered or otherwise concealed.

Mrs. Falkinburg testified that on October 4, in a conversation relative to the steer, defendant said: "Don't feel bad. I will give you a cow in place of it." The defendant did not

tell Falkinburg of the finding of this meat until after he had disposed of it to other parties, although he knew prior to that time that Falkinburg was looking in that locality for his lost animal. Defendant knew where this meat was concealed, knew where the head was concealed, in a badger hole, and when he saw the head he knew it belonged to the Falkinburg steer, and on October 3, defendant said to Falkinburg that the steer was dead; hence the inference is plain that the defendant knew this meat was the meat of the Falkinburg steer, still knowing this, he disposed of it, leading the parties to believe it was his own.

The facts put in evidence by the state, in the absence on the part of defendant of evidence raising a reasonable doubt [1] as to defendant's guilt, were sufficient to sustain a verdict of conviction. The defendant, in his evidence, denied some of these facts, and gave an explanation of his connection with this animal and the beef thereof, which was generally to the effect that he had found the beef there on October 1, but had had no hand in killing it; that he had seen a stranger there in that vicinity at that time; that he had not taken or used any of the meat himself. Most of defendant's evidence was explanatory, but an issue of fact was raised which it was the function of the jury to determine. It is beyond question, from the facts appearing in this record, that the defendant was in possession of the meat of the animal described in the information, claiming to be the owner thereof. It has been many times held by this court that mere possession of property recently stolen is not sufficient of itself to justify conviction. When, however, this fact is supplemented by other facts inconsistent with the idea that the possession is honest, a case is made sufficient to submit to the jury. (*State* v. *Sparks*, 40 Mont. 82, 135 Am. St. Rep. 608, 19 Ann. Cas. 1279, 105 Pac. 87; *State* v. *Willette*, 46 Mont. 326, 127 Pac. 1013.)

The United States supreme court has gone even further, wherein it is held: "Possession of the fruits of crime, recently after its commission justifies inference that the posses-

sion is guilty possession, and, though only *prima facie* evidence of guilt, may be of controlling weight, unless explained by the circumstances or accounted for in some way consistent with innocence." (*Wilson* v. *United States*, 162 U. S. 613, 619, 40 L. Ed. 1090, 16 Sup. Ct. Rep. 895, 898.) Although there was [2] not any direct and positive evidence that the defendant stole the animal described in the information, the possession by the defendant of the meat of the animal and his exercise of ownership over it under the circumstances here indicated, furnish a basis for the inference that he killed the animal, and the evidence was sufficient to justify the court in submitting it to the jury. In connection with the authorities above referred to, we may here call attention to the provisions of section 7853, Revised Codes.

Appellant claims that the court committed error in giving [3] instructions Nos. 5, 7, 8 and 8½, but the record discloses that instruction No. 7 is the only one to which any objection was made at the time of the settlement of the instructions, and for that reason instruction No. 7 is the only one that can now be considered. (Sec. 9271, Rev. Codes; *State* v. *Thomas*, 46 Mont. 468, 128 Pac. 588; *State* v. *Crean*, 43 Mont. 47, Ann. Cas. 1912C, 424, 114 Pac. 603; *State* v. *Cook*, 42 Mont. 329, 112 Pac. 537; *State* v. *Fowler*, 59 Mont. 346, 196 Pac. 992.)

The objection made to instruction No. 7 is as follows: "The defendant objects to the giving of court's instruction [4, 5] No. 7 on the ground and for the reason that it is an incompetent statement of law and not the law, for the reason that in the instruction the court does not instruct the jury that when the explanation by the defendant raises a reasonable doubt in their minds the burden of proof is thrown upon the state to prove the falsity of the explanation given." It is fundamental that instructions must have relation to the facts given in evidence in the particular case. In this particular case, three facts appear in the evidence on the part of the state which were either directly or impliedly admitted by the defendant—at least they are not disputed—to-wit: (a) The

animal described in the information was the property of Sam Falkinburg; (b) that it was stolen about September 30, 1917; and (c) that the defendant had knowledge of the whereabouts of the beef of this animal, and disposed of the same within four days after the animal had been stolen. This was the theory of the case at the time the jury was instructed, as shown, not only by the testimony in the case, but also by the instructions given by the court and the instructions offered by the defendant. Instruction No. 7 is only one of a series of instructions given by the court bearing upon the effect of the possession of stolen property. Instructions Nos. 5, 6, 8, 10 and 11 we believe fully meet the objection which defendant urged to instruction No. 7, and these instructions were not objected to, and are binding upon the defendant. Instruction No. 7 as given is more favorable to defendant than it would have been had it been made to meet defendant's suggestion as appears from the objection made.

The appellant refers to *State* v. *Trosper*, 41 Mont. 442, 109 Pac. 858, but we believe that case, and the authorities cited therein with approval, together with the decision in the *Willette Case, supra*, sustain the position here taken.

The defendant also complains of the act of the court in [6] refusing to give his proposed instruction No. 2. This proposed instruction is to the effect that where the evidence shows that the property was stolen by someone, and the defendant was recently in possession of it, it is wholly immaterial how strong the case may be, he cannot be convicted if the evidence offered by the defendant in explanation of his possession is sufficient to raise a reasonable doubt of his guilt, though the explanation may not be reasonable, probable, satisfactory, or true. As an abstract proposition of law, it is undoubtedly true that it is immaterial how strong a case the state may make against a defendant; if the jury has a reasonable doubt from any cause as to his guilt, it is its duty to acquit him, and this is exactly what the court in this case told the jury to

do by the instructions given—Nos. 5, 6, 7, 8, 8½, 9, 10 and 11—and then by instruction No. 12 the court told the jury that it was the sole judge of the effect and weight of the evidence. We do not approve of the form of this instruction offered by the defendant, and we think the matter stated therein is fully covered by the other instructions given by the court.

Appellant further complains of the action of the court in [7] refusing to give his proposed instruction No. 3. This proposed instruction No. 3 reads: "You are instructed that the mere possession of stolen property, unexplained by the defendant, however soon after the taking, is not sufficient to justify a conviction. It is a circumstance which, taken in connection with other testimony, is to determine the question of guilt. Yet, if you believe from the evidence that the defendant was found in the possession of the property described in the information, or claimed to be the owner thereof after the alleged taking, this is a circumstance tending in some degree to show guilt, but not sufficient, standing alone, unsupported by other evidence, to warrant you in finding him guilty. There must be, in addition to proof of possession of stolen property, proof of corroborating circumstances, tending of themselves to establish guilt."

The only manner in which this instruction differs from instruction No. 5 given by the court is that the proposed instruction contains the additional sentence: "There must be, in addition to proof of possession of stolen property, proof of corroborating circumstances, tending of themselves to establish guilt." In the beginning of the instruction, the court distinctly told the jury that the mere possession of stolen property, although unexplained by the defendant, was not of itself sufficient to justify conviction; hence it necessarily follows that before a jury, yielding obedience to this instruction, could return a verdict of guilty, there must be before it some evidence in addition to the evidence of possession, which tends to connect the defendant with the crime.

By instruction No. 6 the court told the jury that the possession of recently stolen property must be personal and exclusive, and must involve a distinct and conscious assertion of property rights by the defendant, and then the instructions are to the effect that, in addition to this, there must be other evidence. We do not believe there was any error in refusing to give instruction No. 3, offered by defendant.

Defendant's requested instruction No. 1 was merely the general instruction to the jury to acquit. All objections made by the appellant to the instruction given, and to those proposed and refused, have relation almost exclusively to the matter of the evidence, and we here again call attention to the *Willette, Sparks*, and *Wilson Cases, supra.*

We recommend that the judgment and order appealed from be affirmed.

PER CURIAM: For the reasons given in the foregoing opinion, it is ordered that the judgment and order appealed from be affirmed.

Affirmed.

Rehearing denied July 6, 1921.

STATE, RESPONDENT, *v.* BERNDT, APPELLANT.

(No. 4,539.)

(Submitted June 2, 1921. Decided June 20, 1921.)

[199 Pac. 444.]

Criminal Law—Prostitution—White Slavery—Evidence — Insufficiency.

1. Where, under an information charging defendant with a violation of the White Slavery Act (Chap. 1, Laws 1911), in aiding an unmarried woman to obtain transportation from one county to a point in another county, the evidence of the state disclosed no more than that the accused on a certain day conveyed the woman from one point to another in the same county after which they were not again seen together until some five months thereafter, when they were found in another state living together in a state of adultery, it was insufficient to warrant conviction under the information.

Appeals from District Court, Stillwater County; Albert P. Stark, Judge.

AUGUST H. BERNDT was convicted of white slavery and he appeals from the judgment and order denying a new trial. Reversed and remanded.

Messrs. Nichols & Wilson and *Mr. George A. Westover*, for Appellant, submitted a brief; *Mr. Harry L. Wilson* argued the cause orally.

Mr. S. C. Ford, Attorney General, and *Mr. Frank Woody*, Assistant Attorney General, submitted a brief; *Mr. L. A. Foot*, Assistant Attorney General, and *Mr. M. L. Parcells*, County Attorney of Stillwater County, argued the cause orally.

MR. COMMISSIONER SPENCER prepared the opinion for the court.

Defendant was tried and convicted in Stillwater county upon an information charging a violation of section 1 of Chapter 1, Laws of the Twelfth Session, 1911, commonly called the Donlan White Slave Law, and sentenced to an indeterminate term in the state prison. Motion for a new trial was denied, and appeal is from the order denying a new trial and from the judgment.

The information in substance charges the defendant with [1] unlawfully and feloniously aiding and assisting an unmarried woman of the age of eighteen years to obtain transportation from a point in Stillwater county to Butte, in Silver Bow county, Montana, for the purpose of prostitution or concubinage. The testimony discloses that on the early morning of March 4, 1919, the defendant conveyed Mildred Lillian Hoffman, unmarried and eighteen years of age, to Columbus, Stillwater county, Montana, from a point more than twenty miles distant in the same county; that they were not seen together from that date until the following August, in Seattle, Wash-

ington, at which place they were living together unlawfully as husband and wife. The evidence further shows that shortly after his arrest and at other times before trial the defendant made certain statements with regard to his relations with the prosecuting witness, but such statements in no way assist the state in establishing the charge laid in the information, and the record is wholly devoid of any evidence to prove the crime as alleged. The fact, and it is uncontroverted, that defendant and prosecuting witness were living in a state of adultery in a foreign state and at a time more than five months removed from the date charged in the information, and without any other facts or circumstances before the court, except the conveyance to Columbus on March 4, 1919, raises but the merest suspicion of the guilt of the accused and is wholly insufficient to convict.

Upon the trial the defendant offered no defense and moved the court for a directed verdict upon the ground of the insufficiency of the evidence. The motion should have been granted. Under no possible theory is the evidence sufficient to sustain the verdict, and we therefore recommend that the judgment and order refusing a new trial be reversed, and the cause be remanded to the district court of Stillwater county, with directions to grant a new trial.

PER CURIAM: For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded to the district court of Stillwater county, with directions to grant a new trial.

Reversed and remanded.

J. I. CASE THRESHING MACHINE CO., RESPONDENT, v. STEWART, SECRETARY OF STATE, APPELLANT.

(No. 4,764.)

(Submitted June 7, 1921. Decided June 27, 1921.)

[199 Pac. 909.]

License Fees—Foreign Corporations—Capital Stock—Certificates of Increase—Filing Fees—Statutes—Unconstitutionality—Federal Constitution—Commerce and Due Process of Law Clauses.

Foreign Corporations—Capital Stock—Certificate of Increase—Filing Fee—Statute—Unconstitutionality.

1. *Held*, that section 165, Revised Codes, requiring the secretary of state to collect a graduated fee for the filing of certificates of incorporation and increase of capital stock, based upon the entire capital stock, is invalid as to a foreign corporation engaged both in interstate and intrastate business and only a portion of whose capital stock is represented by property owned and business done by it in this state, as in contravention of the commerce and due process of law clauses of the federal Constitution.

Courts—Federal Questions—Decision of United States Supreme Court Conclusive.

2. In a case involving a federal question, the decisions of the supreme court of the United States are conclusive and binding upon state courts.

Appeal from District Court, Lewis and Clark County; Wm. H. Poorman, Judge.

ACTION by the J. I. Case Threshing Machine Company against Charles T. Stewart, as Secretary of State of the State of Montana. From a judgment for plaintiff, defendant appeals. Affirmed.

Mr. Wellington D. Rankin, Attorney General, and *Mr. L. A. Foot*, Assistant Attorney General, for Appellant, submitted a brief; *Mr. Foot* argued the cause orally.

---

1. Imposition of license tax on foreign corporations, see notes in 96 Am. Dec. 338; 3 Ann. Cas. 632; Ann. Cas. 1913C, 812; Ann. Cas. 1916C, 1248; Ann. Cas. 1918C, 620.

[60 Mont. 380.]

Messrs. Gunn, Rasch & Hall, for Respondent, submitted a brief; *Mr. M. S. Gunn* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The J. I. Case Threshing Machine Company is a Wisconsin corporation engaged in the manufacture and sale of farm machinery, with its principal place of business at Racine. It maintains a branch office and supply depot at Billings, Montana, and sub-branch houses at Lewistown, Great Falls and Glasgow. It engages in interstate and intrastate business, but its interstate business is by far the greater. It had complied with the laws of Montana and had actively engaged in the transaction of its business in this state, when it increased its capital stock from $5,000,000 to $40,000,000. It thereupon tendered to the secretary of state of this state, for filing, a duly authenticated copy of the certificate of increase, together with a filing fee of $3. The secretary of state refused to file the certificate except upon the payment of $3,685—the correct fee computed according to the provisions of section 165, Revised Codes. Payment was thereupon made under protest, and this action instituted to recover the difference between the amount tendered and the amount demanded. The trial court rendered judgment for the plaintiff, and defendant appealed.

The integrity of the judgment depends upon the answer to [1] the inquiry: Is section 165, Revised Codes, a valid legislative enactment enforceable against the plaintiff in this action? That section reads as follows:

"The secretary of state, for services performed in his office, must charge and collect the following fees: * * * IV. For recording and filing each certificate of incorporation and each certificate of increase of capital stock, the following amounts shall be charged: Amounts up to $100,000, fifty cents per thousand dollars. Additional from $100,000 to $250,000, forty cents per thousand dollars. Additional from $250,000 to $500,000 thirty cents per thousand dollars. Additional from $500,000 to

$1,000,000, twenty cents per thousand dollars. Additional over $1,000,000, ten cents per thousand dollars. Providing that no fee for filing any articles of incorporation or increase of capital stock shall be less than $20, except religious societies, churches, and organizations for religious purposes, not having a capital stock, and not being organized for the purpose of profit."

Many other states have passed similar statutes, and the controversy over the constitutionality of such legislation has been waged in the courts almost continuously during the last ten years. In 1910 the supreme court of the United States held a similar Act of the Kansas legislature invalid as imposing restrictions upon interstate commerce and taking property without due process of law. (*Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1, 54 L. Ed. 355, 30 Sup. Ct. Rep. 190.) That case was thereafter followed by *Pullman Co.* v. *Kansas*, 216 U. S. 56, 54 L. Ed. 378, 30 Sup. Ct. Rep. 232; *Ludwig* v. *Western Union Tel. Co.*, 216 U. S. 146, 54 L. Ed. 423, 30 Sup. Ct. Rep. 280; *International Text-Book Co.* v. *Pigg*, 217 U. S. 91, 18 Ann. Cas. 1103, 27 L. R. A. (n. s.) 493, 54 L. Ed. 678, 30 Sup. Ct. Rep. 48; and *Atchison, T. & S. F. R. Co.* v. *O'Connor*, 223 U. S. 280, Ann. Cas. 1913C, 1050, 56 L. Ed. 436, 32 Sup. Ct. Rep. 216. In 1913 the question was presented to this court, and, deeming ourselves bound by the decisions of the *Western Union Telegraph Company Case* and kindred cases above, we held that section 165 cannot be enforced as against a foreign corporation engaged in interstate commerce. (*Chicago etc. Ry. Co.* v. *Swindlehurst*, 47 Mont. 119, 130 Pac. 966.) In 1913 the question again came before the supreme court of the United States, in *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, 58 L. Ed. 127, 34 Sup. Ct. Rep. 15. The statutes of Massachusetts involved (Laws 1909, Chap. 490) provided for an excise tax of one-fiftieth of one per cent upon the par value of the authorized capital stock of every foreign corporation doing business in the state, but fixed a limit of $2,000 as the maximum fee to be charged in any case. This statute was upheld as a valid exercise of

legislative authority by the state, and the opinion was quite general among members of the legal profession that the court had, in effect, overruled its former decisions in the *Western Union Telegraph Company Case* and other cases of that group. In harmony with the decision in the *Baltic Mining Co. Case* are *St. Louis, S. W. R. Co.* v. *Arkansas,* 235 U. S. 350, 59 L. Ed. 265, 35 Sup. Ct. Rep. 99; *Kansas City, Pt. S. & M. R. Co.* v. *Botkin,* 240 U. S. 227, 60 L. Ed. 617, 36 Sup. Ct. Rep. 261; *Kansas City, M. & B. R. Co.* v. *Stiles,* 242 U. S. 111, 61 L. Ed. 176, 37 Sup. Ct. Rep. 58; and *General Railway Signal Co.* v. *Virginia,* 246 U. S. 500, 62 L. Ed. 854, 38 Sup. Ct. Rep. 360.

When the question again presented itself to this court in 1914, we held that section 165 might be enforced against a foreign corporation engaged in interstate business in this state, although but a small percentage of its capital stock was represented by the business transacted here, basing our conclusion upon the decision in *Baltic Mining Co.* v. *Massachusetts,* above. (*State ex rel. General Electric Co.* v. *Alderson,* 49 Mont. 29, 140 Pac. 82.) In 1915 our legislature supplanted section 165 so far as it prescribes the fees for filing a certified copy of the charter or articles of incorporation of a foreign corporation entering this state to conduct business, but it did not make any change in the schedule of fees to be charged for filing a certificate of increase of capital stock. (Chap. 37, Laws 1915.) This new legislation met the objections lodged against the Kansas statute in the *Western Union Telegraph Company Case* by imposing the fee only upon the proportion of the foreign corporation's capital stock represented by its property and business in this state, as opposed to the plan adopted in section 165, which imposes the fee upon the entire capital stock wherever held or employed and without reference to the amount of capital used or business transacted in this state. But Chapter 37 has no application to the case now before us.

The secretary of state proceeded under the provisions of section 165 above, and we are confronted again with the question: Is this statute a valid legislative enactment as applied to any foreign corporation a portion only of whose capital stock is represented by property owned and business transacted in this state? The prevailing impression that the *Baltic Mining Company Case* had modified or overruled the decision in the *Western Union Telegraph Co. Case* was finally dissipated completely by more recent decisions of the supreme court of the United States. In *Looney* v. *Crane Co.*, 245 U. S. 178, 62 L. Ed. 230, 38 Sup. Ct. Rep. 85, decided in 1917, there came before the court the question of the validity of a statute of Texas in principle the same as our section 165, and upon a statement of facts which cannot be distinguished from the facts of the present case. The court held the statute invalid, reaffirmed the *Western Union Case*, and referred specifically to the contention advanced that the *Baltic Mining Co. Case* had overruled it. The court not only disclaimed any intention to do so, but insisted that no such effect could be given to the decision in the latter case. On the contrary, the court pointed out that the *Baltic Case*, and other cases of that group, proceeded upon conditions peculiar to the particular cases; that the statute involved in each of those controversies contained particular provisions which so qualified and restricted its operation and necessarily its effect as to lead to the result reached. Those conditions, the court said, related to the subject matter upon which the tax was levied or to the amount of the taxes in other respects paid by the corporation, or limitations on the amount of the tax authorized when a much larger amount would have been due upon the basis upon which the tax was apparently levied. In 1914 the Massachusetts statute of 1909 was amended by removing the limitation of $2,000 as the maximum tax to be collected. In *International Paper Co.* v. *Massachusetts*, 246 U. S. 135, Ann. Cas. 1918C, 617, 62 L. Ed. 624, 38 Sup. Ct. Rep. 292, the validity of this amended statute was the question for determination. The

court again reaffirmed its decision in the *Western Union Telegraph Co. Case,* held that the new legislation in Massachusetts rendered the statute invalid, and again reviewed the controversy which had arisen over the seeming conflict between the group of cases represented by the *Baltic Mining Co. Case* on the one hand, and the group represented by the *Western Union Telegraph Co. Case* on the other, expounded the views of the court, and declared that the *Western Union Telegraph Co. Case* and kindred cases, including *Looney* v. *Crane Co.,* were decisive of the case then under consideration. The court declared the following principles to be settled:

"1. The power of a state to regulate the transaction of local business within its borders by a foreign corporation—meaning a corporation of a sister state—is not unrestricted and absolute, but must be exerted in subordination to the limitations which the Constitution places on state action.

"2. Under the commerce clause exclusive power to regulate interstate commerce rests in Congress, and a state statute which either directly or by its necessary operation burdens such commerce is invalid, regardless of the purpose with which it was enacted.

"3. Consistently with the due process clause, a state cannot tax property belonging to a foreign corporation and neither located nor used within the confines of the state.

"4. That a foreign corporation is partly, or even chiefly, engaged in interstate commerce, does not prevent a state in which it has property and is doing a local business from taxing that property and imposing a license fee or excise in respect of that business, but the state cannot require the corporation, as a condition of the right to do a local business therein, to submit to a tax on its interstate business or on its property outside the state.

"5. A license fee or excise of a given per cent of the entire authorized capital of a foreign corporation doing both a local and interstate business in several states, although declared by the state imposing it to be merely a charge for the privilege

of conducting a local business therein, is essentially and for every practical purpose a tax on the entire business of the corporation, including that which is interstate, and on its entire property, including that in other states; and this because the capital stock of the corporation represents all its business of every class and all its property, wherever located.

"6. When tested, as it must be, by its substance, its essential and practical operation, rather than its form or local characterization, such a license fee or excise is unconstitutional and void as illegally burdening interstate commerce and also as wanting in due process because laying a tax on property beyond the jurisdiction of the state."

Furthermore, it was observed that the Massachusetts statute of 1909 contained the limitation above mentioned, and that that feature of the law was a material factor in the decision of the *Baltic Mining Co. Case.* At the same time a like conclusion was announced in *Locomobile Co.* v. *Massachusetts,* 246 U. S. 146, 62 L. Ed. 631, 38 Sup. Ct. Rep. 298. Whatever difference of opinion may have existed heretofore respecting the power of a state to exact an excise tax as a condition precedent to the right of a foreign corporation to do business therein, further discussion of the subject must now be deemed foreclosed. A statute which imposes the tax upon the total capital stock when only a portion thereof is represented by the property and business of the corporation in the state imposing taxes is invalid. If the corporation is engaged in interstate commerce in whole or in part, such a statute contravenes the commerce clause of the federal Constitution; and such a statute is violative of the due process clause of the Fourteenth Amendment, whether the corporation is engaged in interstate or intrastate commerce. A statute may escape condemnation if it imposes the tax only upon the proportion of the total capital stock represented by the property and business in the state imposing the tax, or if it provides a reasonable maximum charge to be imposed without reference to the total capital stock.

It would be idle now to attempt to justify the decision in [2] the *Alderson Case*, above, or to volunteer our views upon the subject now under discussion. In a case involving a federal question such as is here presented, the decisions of the supreme court of the United States are conclusive and binding upon us to the same extent and with the like effect as are the Constitution and laws of the United States, anything in our own Constitution, statutes and decisions to the contrary notwithstanding. Under the doctrine of the *Western Union Telegraph Company Case* and kindred cases, including the three recent ones mentioned, the invalidity of section 165, as applied to this plaintiff and other foreign corporations similarly situated, is established beyond controversy.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, COOPER and GALEN concur.

GENERAL ELECTRIC CO., RESPONDENT, *v.* STEWART, SECRETARY OF STATE, APPELLANT.

(No. 4,765.)

(Submitted June 7, 1921. Decided June 27, 1921.)

[199 Pac. 911.]

Foreign Corporations—Capital Stock—Certificate of Increase—Filing Fee—Statutes—Unconstitutionality—Federal Constitution—Due Process of Law Clause.

1. Section 165, Revised Codes, imposing upon the secretary of state the duty to collect a fee for filing a certificate of increase of the capital stock of a foreign corporation doing an intrastate business, only a small portion of which stock is represented by property owned and business transacted within the state, which fee is computed upon its entire capital stock as increased, *held* invalid as violative of the due process of law clause of the federal Constitution.

[60 Mont. 387.]

Appeal from District Court, Lewis and Clark County; W. H. Poorman, Judge.

ACTION by the General Electric Company against Charles T. Stewart, as Secretary of State of the State of Montana. From a judgment for plaintiff, defendant appeals. Affirmed.

Mr. Wellington D. Rankin, Attorney General, and *Mr. L. A. Foot,* Assistant Attorney General, for Appellant, submitted a brief; *Mr. Foot* argued the cause orally.

Messrs. Gunn, Rasch & Hall, for Respondent, submitted a brief; *Mr. M. S. Gunn* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The General Electric Company is a New York corporation which complied with the laws prescribing the terms upon which a foreign corporation may engage in business in this state. In 1918 it increased its capital stock from $105,000,000 to $125,000,000, and later again increased it to $175,000,000. It tendered to the secretary of state of this state a duly authenticated copy of each of the certificates of increase, together with a filing fee of $8. The secretary of state declined to file the certificates unless a fee of $7,376, computed according to the provisions of section 165, Revised Codes, was paid. The fee was paid under protest, and this action was brought to recover the difference between the amount tendered and the amount demanded. The trial court rendered judgment for plaintiff, and defendant appealed.

The argument of the attorney general is devoted to an [1] attempt to demonstrate that the entire business of the plaintiff corporation in this state is intrastate in character, and therefore that it is subject to the exactions made by section 165, above. For all purposes of this appeal it may be conceded that plaintiff's business in this state is entirely local

in character, but this concession relieves us only from considering the statute above as an attempt on the part of the legislature to authorize the regulation of interstate commerce. The fee required by the statute is computed upon the entire capital stock of the foreign corporation which seeks to do business in this state, whereas it is admitted by defendant that less than one per cent of plaintiff's paid-up capital stock is represented by property owned and business transacted by it in this state. The supreme court of the United States has held repeatedly: (1) That a state statute which imposes upon a foreign corporation seeking to do business in the state an excise tax or license fee computed upon the entire capital stock, when only a part is represented by property owned and business conducted in the state, is essentially, and for every practical purpose, a tax on the entire property of the corporation, because its capital stock represents all of its property wherever located; (2) that a state cannot tax property outside of its territorial limits; and (3) that a statute which attempts to authorize the imposition of such a tax or fee, computed upon the entire capital stock, where only a portion of it is represented by property owned and business transacted in the state levying the tax, is violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States, and therefore void. (*International Paper Co.* v. *Massachusetts*, 246 U. S. 135, Ann. Cas. 1918C, 617, 62 L. Ed. 624, 38 Sup. Ct. Rep. 292, and cases cited.)

If we eliminate from our consideration the contention that section 165 attempts to authorize the regulation of interstate commerce, this controversy then is not distinguishable from the one involved in *J. I. Case Threshing Machine Co.* v. *Stewart*, *ante*, p. 380, 199 Pac. 909. Upon the authority of that case the judgment herein is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, COOPER and GALEN concur.

STATE, RESPONDENT, *v.* STEVENS, APPELLANT.

(No. 4,773.)

(Submitted June 4, 1921. Decided June 27, 1921.)

[199 Pac. 256.]

Criminal Law — Grand Larceny — Admissions—Confessions—Motive — Evidence — Jurisdiction — County Attorney — Argument to Jury—New Trial—Newly Discovered Evidence—Harmless Error.

Criminal Law—Guilt of Defendant Established—When New Trial not to be Granted.

1. Where the record conclusively establishes the guilt of the defendant charged with crime, a new trial will not be granted even though there was error on the trial, unless it clearly appears that such error actually prejudiced him in his right to a fair trial.

Grand Larceny—Mental Attitude of Defendant—Evidence—Admissibility.

2. In a prosecution for grand larceny, a statement of accused, made shortly before the commission of the crime, that it was unfair for some to have millions and others no money, that it should be distributed equally, and that most of the rich, including the president of the bank for which he worked and from which he stole, got their money by robbing the poor, *etc.*, *held* admissible to show the mental attitude of defendant toward private rights in property as well as his prejudice against persons who have acquired property.

Same—"Confession"—"Admission"—Definition.

3. A "confession" is an acknowledgment in express terms, by a party in a criminal case, of his guilt of the crime charged, while an "admission" is a statement by the accused, direct or implied, of facts pertinent to the issue, and tending, in connection with proof of other facts, to prove his guilt, but of itself insufficient to authorize a conviction.

Same—Admissions Against Interest—Admissibility.

4. While confessions may not be received in evidence unless shown to have been made voluntarily, admissions against interest are admissible without such a foundation having been laid, the party charged to have made them being permitted to show the circumstances under which they were made, for consideration of the jury in determining their weight.

Same.

5. Statements of one accused of grand larceny that two others were to meet him and divide the money, that his superior officer in the bank to which the money belonged told him to bring it to him from the postoffice, he to receive part of it, and that, on his way to the bank with the money, he stepped into an empty building, where two men received the money, knocked him down, went with him to the back of a house, where they gagged him, and that he was to meet them afterward and receive his share, were admissions, not confessions, being mere statements of fact from which guilt

[60 Mont. 390.]

might be inferred, but not acknowledgments thereof, and therefore admissible without first showing they were made voluntarily.

Same—Contradictory and False Statements—Admissions.

6. Statements made by defendant, claimed by him to have been confessions, which were contradictory of each other and false and used by the state, not as confessions, but as showing his attitude toward the crime, though on a different state of facts, *held* admissible as admissions against interest.

Same—Motive—Efforts to Borrow Money—Admissible in Evidence.

7. Evidence of efforts on the part of defendant charged with larceny to obtain a loan shortly prior to its commission was admissible to show an inducement or motive for the crime.

Same—Failure of Defendant to Testify—Instruction—Harmless Error.

8. Where defendant did not testify in his own behalf, an instruction in the words of section 9484, Revised Codes, that if defendant does testify, the jury, in judging of the credibility and weight of his testimony, may take into consideration the fact that he is the defendant and the nature and enormity of the crime, though unnecessary, was harmless.

Same—Money Surreptitiously Taken from Postoffice—Jurisdiction.

9. The fact that defendant bank employee surreptitiously secured the money with the larceny of which he was charged from the United States postoffice, and thus also committed an offense against the federal law, did not deprive the state court of jurisdiction to try the cause as for a crime committed under its statute, the jurisdictions not being conflicting.

Same—Admissions Against Interest—Whole of Statement to be Considered by Jury.

10. In considering statements against interest made by defendant after the charge for which he is on trial was made, the jury should take into consideration the whole statement or conversation, in view of the likelihood of the witness to forget or misunderstand what was said or intended.

Same—Admissions—Self-serving Declarations—Inadmissibility.

11. Evidence of statements in behalf of the party making them is not competent; hence an instruction that defendant was entitled to the benefit of what he said in his own behalf in certain admissions was properly refused.

Same—Trial—Objectionable Remarks by County Attorney—When not Reviewable.

12. Where the county attorney's argument to the jury is not shown in the record, and the portions of it deemed objectionable are not settled in any way by the court, error in this regard cannot be considered on appeal.

Same—Trial—Remarks by County Attorney—Context must be Shown.

13. A single statement or remark of the county attorney in his address to the jury, apart and separate from the connection in which it was used, is incapable of accurate interpretation, and hence determination of whether it was prejudicial to defendant, impossible.

---

7. Admissibility of evidence of financial condition of defendant in prosecution for larceny, see note in 19 Ann. Cas. 117.

[60 Mont. 390.]

Same—Admissions—Improper Persuasion and Inducements—Not Ground for New Trial.

14. Alleged improper methods consisting of persuasion and inducements to secure from defendant a statement as to the truth of defendant's connection with the larceny charged against him went to the weight of the statement as evidence for the jury's determination, and did not constitute a ground for a new trial, the interests of defendant having been fully protected on the trial in this respect.

Same—Newly Discovered Evidence—New Trial—When not to be Granted.

15. A new trial asked for on the ground of newly discovered evidence, based on a stipulation of counsel that after trial and sentence events occurred which showed that defendant did not profit from his crime, but that others obtained the money from the place where it was hidden by defendant, cannot be granted by the supreme court for the purpose of enabling him to obtain a lighter sentence than the court imposed in the absence of such knowledge.

Appeals from District Court, Lewis and Clark County; R. Lee Word, Judge.

CHARLES STEVENS was convicted of grand larceny, and appeals from the judgment and an order refusing a new trial. Affirmed.

Mr. A. H. McConnell and *Mr. F. W. Mettler*, for Appellant, submitted a brief and one in reply to that of Respondent; *Mr. Mettler* argued the cause orally.

The testimony of the witness Patrick Keys was improperly admitted. It could not have and did not have the remotest relation to or bearing upon the question of whether the defendant was guilty as charged in the information. On the other hand, it was calculated to, and undoubtedly did, prejudice the defendant in the minds of those members of the jury, if any, who were not socialists, or who might have lots of money, or have friends who had lots of money, and who did not obtain it by robbing the poor. As stated in the objection to the testimony, these statements only tend "to show the philosophy of the defendant," and while this philosophy may be unsound, it is not in any way criminal or unlawful. If the defendant had expressed the opinion or belief that in order to bring about the equal distribution of money it would be proper to steal from the rich; or if he had said that because

the rich people had stolen their money it would be proper to steal from them in turn, a different question would now be presented.

The testimony of the witness Benedict was even more glaringly incompetent, improper and prejudicial. It was to the effect that a short time before the time of the alleged robbery the defendant came to him with Mrs. McNamara for the purpose of borrowing $4,000, which was not the offense charged. If it is criminal or immoral to attempt to borrow money, then all men are immoral,—and some women. If an attempt to rob Gilbert Benedict of $4,000 had been made, it is very doubtful if the evidence would be even then competent, because there was no real or apparent connection with the offense charged.

To render evidence of collateral facts competent, there must be some natural, necessary or logical connection between them and the inference or result which they are designed to establish. (8 R. C. L. 180, sec. 172.) A wider range of evidence is permitted in showing intent or motive than is allowed in support of other issues. But it cannot be extended to facts or circumstances which do not naturally or necessarily bear on the issue to be established, precisely as evidence of all collateral facts and circumstances must be confined to the proof of those which have a legitimate and direct connection with the principal transaction. (*Id.*, sec. 174.) Where a prisoner is charged with an offense, it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment and matters relating thereto, which, alone, he can be expected to come prepared to answer. (*Id.*, sec. 194.)

The court erred in admitting in evidence the alleged confessions, or, as they are called by counsel for the state and the lower court, "admissions," of the defendant, as set forth in specifications of error No. 8, 9, 10 and 11. There were two of these confessions, the first implicating Ford and Blodgett, and the second implicating Kaufman and his nephew, Earl Fallon.

We will first take up the question of whether these statements are in fact confessions, or merely admissions.

Mr. Wharton in volume 2 of his work on Criminal Evidence, page 1266, distinguishes confessions from admissions as follows: "An admission is distinguished from a confession by the fact that the term 'admission' in criminal matters relates to matters of fact that do not involve criminal intent, and a confession is an acknowledgment of guilt. The distinction between confessions and admissions must always be maintained, from the fact that admissions are always admissible in evidence under an exception to the rule excluding hearsay evidence, provided such admissions are made against interest, while a confession must be affirmatively shown to have been made under conditions which would not induce a false statement." A reading of the details of the written confession implicating Ford and Blodgett, in the light of the foregoing clearly defined distinction between an admission and a confession, will leave no doubt that it is a confession, pure and simple.

Each of these confessions, while absolutely inconsistent with the other, is perfectly consistent with the guilt of the defendant, and utterly inconsistent with his innocence. In neither case is there a single element or fact necessary to constitute the offense charged in the information. In neither confession is there anything to indicate that the defendant participated in the crime unwillingly, either through fear or compulsion, and in each case the apparent motive was that he was to receive a part of the stolen money.

Of course, both confessions were apparently false, at least in part, but this does not change their character as confessions. The very purpose of the rule of law requiring that confessions shall be voluntary is to prevent false confessions from being given. (*State* v. *Guie*, 56 Mont. 485, 186 Pac. 329.) In the case last above cited this court has laid down the rule and definition that a confession, as applied in criminal law, is a statement by a person made at any time afterward,

that he had committed, or participated in the commission of, a crime. The two confessions under consideration come squarely within that definition, and their admission in evidence was prejudicial error.

It is elementary law that a confession of a person accused of crime is inadmissible in evidence if not freely and voluntarily made. (1 R. C. L., sec. 100, p. 552.) One of the prime requisites of a confession competent to be proved against the party making it is that it be made voluntarily and without restraint, coercion or influence of any kind, but if so made it is competent evidence. (3 Ency. of Ev., p. 301.) The foregoing rule has been laid down in this state in a very early decision. (*Territory* v. *McClin*, 1 Mont. 394.) Also in a later case it was held that it is elementary that before a confession can be received in evidence in a criminal case it must appear that it was voluntary. (*Territory* v. *Underwood*, 8 Mont. 131, 19 Pac. 398.)

Among other states which have adopted the rule above set forth as to the burden of proof in the case of the offer of a confession is California. (*People* v. *Soto*, 49 Cal. 67; *People* v. *Castro*, 125 Cal. 521, 58 Pac. 133.) While not directly passing upon the point, this court has by implication, at least, approved the rule in a comparatively recent case. (*State* v. *Guie*, 56 Mont. 485, 186 Pac. 329.)

Newly discovered evidence: Testing the newly discovered evidence presented by the defendant in this case upon the motion for a new trial, we contend that it answers every one of these requirements laid down as necessary in the case of *State* v. *Van Laningham*, 55 Mont. 17, 173 Pac. 795.

It may be argued that even if the newly discovered evidence were offered upon a new trial, the defendant would nevertheless be found guilty. But it cannot be argued that upon a verdict of guilty the result would be the same so far as the penalty is concerned. The record in this case shows that the defendant was given the extreme penalty under the law, probably for the reason that the trial judge was of the opinion

that the defendant had made away with the money, or that he had knowledge of the person or persons who had done so. The newly discovered evidence shows that the defendant did not know where the money was, and had nothing to do with its being taken from the old Kleinschmidt building. Had the facts as set forth in the stipulation of the parties hereto, and presented upon the motion for a new trial, been before the court at the time sentence was pronounced on the defendant, it seems certain that the extreme penalty would not have been imposed; and the imposition of a less penalty would be a changing of the result.

While the exact point we are here attempting to present has apparently not been passed upon by the courts, the principle upon which it is based has been laid down in an Iowa case as follows: Newly discovered evidence of the value of the embezzled property which will reduce the offense from a felony to a misdemeanor is ground for a new trial. (*State* v. *Foster*, 37 Iowa, 404.)

Mr. Wellington D. Rankin, Attorney General, being disqualified, *Mr. Jos. R. Wine*, County Attorney of Lewis and Clark County, submitted a brief in behalf of Respondent, and argued the cause orally.

MR. JUSTICE REYNOLDS delivered the opinion of the court.

Defendant was charged with grand larceny, tried and convicted, and judgment followed. Motion for new trial was made and overruled. Defendant has appealed from the judgment and order overruling the motion. Motion was made in this court to dismiss the appeals because of delay of appellant in serving and filing transcript and brief.

Defendant was employed by the Union Bank & Trust Company of Helena, and was under the immediate supervision of R. O. Kaufman, one of its officers. The bank arranged for a shipment of $40,000 in currency from Butte, which reached Helena on the fifth of November, 1919. Defendant, although

not authorized to do so, called at the postoffice for the package and received it. His conduct while returning to the bank attracted the attention of one Mrs. Agnes Watkins, who saw him, with a package in his hand, enter a building on Park Avenue known as the Old Kleinschmidt building. Later he was seen by her to emerge from the building without the package, and proceed rapidly in the direction of the bank. Later defendant was found lying face downward in a small shed or alleyway, bound and gagged, and with the appearance of having been seriously injured. He was taken to the hospital, where he first told a story of having been robbed. However, there were features in connection with the story which caused it to be disbelieved, and thereafter defendant made several different statements as to the affair which evidently were false. The questions involved on these appeals relate to the admissibility of evidence, alleged errors in giving and refusing instructions, newly discovered evidence, and misconduct of counsel for the state.

The contention is not made that defendant was innocent of the crime charged, but that technically he did not receive a fair trial in the respects mentioned. While an accused person, even though guilty, is entitled to a fair trial, yet this [1] court will not grant a new trial where the record conclusively establishes the guilt of the defendant, even though there was error, unless it clearly appears that the error of which complaint is made actually prejudiced the defendant in his right to a fair trial.

It is alleged that the court erred in admitting in evidence [2] the testimony of witness Patrick Keyes, wherein he stated that at a short time prior to the larceny defendant stated that he "thought it was unfair for some people to have hundreds of thousands or a million dollars, and a poor person not have any; he thought the money should be distributed equally with everybody, and the most of the people that had lots of money, they got it by robbing the poor people," in that connection referring particularly to Mr. McKinnon, president

of the Union Bank & Trust Company. Objection was made to this testimony on the ground that it only tends to show the philosophy of the defendant, which has no probative value, and that it was not connected, either directly or indirectly, with the issues involved. It may be conceded that this evidence is somewhat remote, but we cannot hold that it was entirely immaterial. Such evidence tends to show the mental attitude of the defendant toward private rights in property, and, while not direct evidence that he did or would commit such a crime, yet it has a bearing in showing a prejudice against people who have acquired property, particularly the president of the bank from which bank the money was taken, which, in turn, would tend to make it easier to excuse one's self in an attempt to take such property from another who, he believes, has illegitimately secured it.

The state offered in evidence testimony of Lester Lightbody, **[3, 4]** deputy sheriff, as to certain statements against interest made by defendant, to which defendant objected and saved his exception. The first statement was included within the following testimony: "At this time, when the name of Marias or some similar name was given, the defendant was asked—I think Mr. Barnes said, 'Charley, them ain't the names of them fellows; you know the names of them,' and he said, 'Is it Ford and Blodgett?' And Stevens says, 'Yes.' He said they was to meet him at the Palmer House that night and divide the money. Ford and Blodgett was arrested that morning about five minutes after Stevens told us this. Stevens was then taken to the county jail, and Ford and Blodgett were arrested at the Palmer House. I was present in the jail later when Ford and Blodgett and Stevens were there."

The second statement was included in the following testimony: "He told me he was sorry that he got Ford and Blodgett in any trouble; that they were innocent of any wrongdoing. He said they had nothing to do with it. At this time he said Ralph Kaufman had something to do with it, and that he turned the money over to Kaufman. The story

he told me as to how the whole thing happened was that he was to go and get the money and was to go back to the bank with it, and that if nobody there had seen him come in he was to go down to the basement with the money. As to where they made this arrangement, he said that Mr. Kaufman came up to his desk and made the arrangement at his desk; that he said he had been very good in helping him along, and intended to keep on helping him, and then he told him he wanted Stevens to go and get this money and fetch it to him. He did not say that Earl Fallon had any connection with this story. He did not tell me anything about Fallon at this time at all, not on that day at all; it was the next day he told me about Fallon. As to what he said when he came back to the bank and just how they arranged that, he said he went down to the basement and turned the money over to Mr. Kaufman. He told me how much he was to receive for his part in it; he was to receive $500. He did not say who was to get the rest. With reference to the explanation he made to me relative to any footmarks or finger-prints on State's Exhibit 15, the paper, I told him it looked peculiar to me when a paper would be found in that building when it could be burned up in the basement, and what was his idea in going back with the paper; he said that it wasn't his idea; that Kaufman wanted him to take the paper back there. As to the way he said any print got on the paper, he told me Mr. Kaufman had him step on the paper in the basement, and had him put his hand in the dust and put the finger-prints on the paper, and that Mr. Kaufman had him take the paper back to the Kleinschmidt building. He did not explain to me at that time how he came to be tied up. I had a further conversation with him about Fallon; I had several conversations with him about Fallon, but he never said anything connecting Fallon with it at all, with the exception of once when he said he didn't see why 'they didn't get Fallon and put him in jail, as well as putting me in jail.' He was asked at that time as to why Fallon should be put in jail, and he refused to answer. This defendant told me the money was

in the bank; he said he turned it over to Mr. Kaufman. He told me the reason he told the story about the robbery and of the automobile being in the alley was because that was the first story that he and Kaufman had made up. He told me that when he seen the officers did not believe the story Mr. Kaufman said, 'Charley, we will have to change that story; they don't believe it.' According to what Stevens said, it was Kaufman that told him to tell the Ford and Blodgett story, and he said they made the arrangement to tell the Ford and Blodgett story in the county jail."

Objection was also made to the introduction in evidence of State's Exhibit 28 on the same ground, which exhibit consists of a written statement in defendant's handwriting, and is as follows: "The man by the name of Ford whom I saw in the county jail Friday morning, November 7, stopped me on Main Street some time I believe during the month of September, and wanted to carry a sack of silver containing $1,000 to the express office. Two different times, either before or afterward, he stopped me on Main Street and remarked about large packages of currency from the postoffice. Yesterday morning while I was on my way to the postoffice I met this man Ford, accompanied by a gray-haired man, whom I also saw in the county jail at the same time Ford was there. I have been since told that the gray-haired man's name is Blodgett or similar name. I know him positively when I see him. These men mentioned to me about a package of money at the postoffice. They told me to let them have the money when I secured it, and I would make some haul. They said to come down Park Avenue, and they would take it and do away with the whole thing, and at the same time make a hell of a fight to keep it. Most of the talking was done by Ford. I went to the registry window at the postoffice, and Mr. Faith refused to let me have the registered mail, and said my order had been canceled, so I said that I would get Mr. Chivers or someone with authority to come and get it; I went back to the bank by way of Park Avenue, but seen neither of the men. After lunch I again

went back to the postoffice after doing some errand, and got the common mail, and then went over to the registry window, and Mr. Williams said, 'What bank?' and I said, 'Union,' and he gave me the registered mail, three in all, including the currency which was stolen. I went down Park Avenue, and one man stepped out of the empty building and walked down the street, and then I came to an open door, and inside stood the two men, and received the currency, and also grabbing my leather pouch, containing some $600. There are the two men above described. I also went into the building and was knocked down by one in trying to secure my leather pouch. Then they said they would hide it, and then the both of them and myself went over to the back of the Smoke House, and I was gagged by both and tied and that was all I can remember, only that I was to meet them in the Palmer House last night; they told me in the old empty rock building above mentioned I would receive my share."

The objections to these statements and exhibit were based on the claim that each of them constituted a confession by defendant, and therefore they were not admissible in evidence under the rule that a confession may not be received in evidence unless a proper foundation is laid therefor, showing that it was made voluntarily, without threats or inducements whereby there might appear to be an object in the accused making a false confession. This rule was not established to protect the guilty against his truthful confession, but is designed to guard the innocent against a false confession made under duress, promise of reward of some nature, or other inducement. If the foregoing statements constituted in law confessions, then this question of their admissibility would arise. The state, however, contends that these statements were not confessions, but merely admissions. If they were admissions, then the rule applicable to confessions does not apply, for admissions against interest are always competent without such a foundation being laid, with the privilege, however, to the opposite party on cross-examination to show the circum-

stances under which they were made, which circumstances may be considered by the jury in determining the weight to be given to them. The vital point, then, is whether or not the statements hereinbefore set forth were admissions or confessions.

This court has discussed this question concisely but clearly in the case of *State* v. *Guie*, 56 Mont. 485, 186 Pac. 329, where Wharton's Criminal Evidence on this subject is quoted with approval by Mr. Justice Holloway, who delivered the opinion of the court: "The distinction between a confession and an admission, as applied in criminal law, is not a technical refinement, but based upon the substantive differences of the character of the evidence deduced from each. A confession is a direct acknowledgment of guilt on the part of the accused, and, by the very force of the definition, excludes an admission, which, of itself, as applied in criminal law, is a statement by the accused, direct or implied, of facts pertinent to the issue, and tending, in connection with proof of other facts, to prove his guilt, but of itself is insufficient to authorize a conviction."

A confession is an acknowledgment in express terms, by a party in a criminal case, of his guilt of the crime charged, and it is only with respect to confessions thus defined that the rule prevails that preliminary proof that they were voluntary must be made before they can be admitted in evidence. (*People* v. *Fowler*, 178 Cal. 657, 174 Pac. 892.) "Unless the statement of the defendant is broad enough to comprehend every essential element necessary to make out the case against him, it cannot be said to be an admission of guilt." (*Owens* v. *State*, 120 Ga. 296, 48 S. E. 21.) "A 'confession' in a legal sense is restricted to an acknowledgment of guilt, made by a person after an offense has been committed, and does not apply to a mere statement or declaration of an independent fact from which such guilt may be inferred." (*State* v. *Reinhart*, 26 Or. 466, 38 Pac. 822.)

If any one of the statements made by defendant constituted [5] a direct acknowledgment on his part that he stole the

money, then such statement constitutes a confession, but if it was merely a statement of relevant facts from which guilt might be inferred, of itself insufficient to authorize a conviction, then it was merely an admission. In the first statement defendant merely charged Ford and Blodgett with the larceny, and said that they were to meet him that night to divide the money. The statement was a statement of facts from which guilt might be inferred, but was not an acknowledgment that he had appropriated the money, or any part thereof, to his own use, with intent to deprive the true owner thereof, which elements were necessary to establish his guilt. The second statement consisted, in substance, of a charge that Mr. Kaufman directed him to get the money and to deliver it to him in the basement of the bank, that he did so, and that he was to receive $500 for the service. From this statement alone the essential elements of the crime are not shown, and no conviction could possibly have been based upon it. It does not even appear from that statement that he ever received the $500 promised, or any other portion of the money that was taken; and, so far as getting the money and delivering it to Kaufman was concerned, that could not constitute a larceny on the part of defendant, because Kaufman was his superior officer in the bank, and one who had the right to direct defendant to get the money and turn it over to him. The only allegation in Exhibit 28 which would be incriminating at all would be the statement by defendant that he went down Park Avenue, stepped inside the open door of an empty building, when two men received the currency and grabbed the leather pouch containing $600, knocked him down, and said that they would hide it, and that they went with defendant to the back of the Smoke House, gagged him, and that defendant was to meet them at the Palmer House that night, where he would receive his share. The foregoing is a statement of facts from which an inference may readily be drawn that defendant was in a conspiracy with these men to commit the crime, but it is not an acknowledgment that he stole the money. He does not say

that he voluntarily delivered the money to the men, or that he voluntarily submitted to being gagged and tied by them, or that he afterward went to the Palmer House to meet them, or received any share of the fund.

It is also to be noted that these statements of defendant [6] were not used as confessions to prove the facts set forth in the several statements. They were contradictory of each other, and the state tried its case upon the theory that each of them was absolutely false; hence the state did not contend that as confessions they categorically established the guilt of defendant, but merely that they showed his attitude toward the crime. Naturally an innocent man will tell the truth regarding the affair in question, and not make misrepresentations inconsistent with each other. For these reasons the statements in this case were inconsistent with any theory of innocence on the part of defendant, thus tending to prove his guilt, even though on a different state of facts; and for this reason they were competent evidence as admissions of facts made against interest. It is therefore our opinion that the ruling of the court in holding that these various statements were admissions and not confessions was correct, and hence no error was committed in the court's rulings upon the objections.

It is urged that the court erred in admitting evidence of [7] Gilbert Benedict to the effect that a short time before the date of the larceny defendant, together with one Mrs. McNamara, came to him for the purpose of borrowing $4,000, and that he did not have the money to give to them. Efforts on the part of defendant charged with larceny, made to secure money shortly prior to the alleged crime, are admissible in evidence for the purpose of showing an inducement or motive for committing the crime. It must be presumed that a person will not seek to make a loan of money unless he wants the money, and if he wants the money then that fact is in itself a motive for stealing it.

Complaint is made that the court erred in giving to the [8] jury instruction No. 24, which reads as follows: "A

defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but he may be sworn and may testify in his own behalf, and the jury in judging of his credibility and the weight to be given to his testimony may take into consideration the fact that he is the defendant, and the nature and enormity of the crime of which he is accused. If the defendant does not claim the right to be sworn, or does not testify, it must not be used to his prejudice, and the attorney prosecuting must not comment to the court or jury on the same." Objection was made for the reason that in this case the defendant did not take the stand, and therefore any charge to the jury advising it how to judge of his credibility and the weight to be given to his testimony was improper. The instruction in question is a literal copy of the statute, and unquestionably is a correct statement of the law. (Rev. Codes, sec. 9484.) Inasmuch as the defendant did not take the stand in his own behalf, it was unnecessary for the court to instruct the jury in regard to the weight it should give to his testimony, for he gave no testimony to consider; but we are unable to see wherein the giving of the instruction could have been harmful. Since defendant did not testify, the jury could not act upon that portion of the instruction.

Defendant offered three different instructions, to the effect [9] that if defendant took the money from the United States postoffice with the intention to steal the same and thereafter appropriate the same to his own use and benefit with the intention of depriving the true owner thereof, then the offense would be one over which the federal court has exclusive jurisdiction. It may be conceded that, under a situation such as is set forth in the instruction, such offense would be a violation of the laws of the United States, and that it would be such an offense as would be within the jurisdiction of the federal courts, although we do not pass upon that question. The mere fact, however, that it was an offense against the federal law does not deprive the state court of jurisdiction in the prosecution of an offense that defendant may have committed

under the state law. The jurisdictions are not conflicting, but each has full and complete jurisdiction in its respective courts. A similar situation exists as to many crimes, among which are the familiar one of sedition and counterfeiting. We find no error in the refusal of these offered instructions.

An instruction was offered by defendant as to the weight to be given to the alleged confessions which were admitted in evidence, going into detail as to the facts and circumstances which should be considered by the jury in determining the weight to be given to them. The court gave an instruction practically *verbatim* of that offered by defendant, except that the word "admissions" was inserted in place of the word "confessions." In view of our holding that these statements were admissions, the court properly modified the instruction as above mentioned, and as properly refused the one offered by defendant.

Several other instructions were offered by defendant regarding the weight to be given to the alleged confessions, and the necessity that such confessions be freely and voluntarily made before they may be received as evidence. These instructions were properly refused on the theory that the statements were admissions and not confessions.

Exception was taken to the refusal of the court to give the [10, 11] following offered instruction: "You are instructed that you have a right to consider any statements shown to have been made by the defendant after the charge was made against him, but in considering such statements you must consider the whole statements or conversation together. The defendant is entitled to the benefit of what he said in his own behalf, if you believe it is true; but if you do not believe it is true, you are not bound to believe and consider it because proven by the state. You should consider such statement, however, with caution, on account of the liability of the witness to forget or misunderstand what was really said or intended." This instruction contains some features of merit, but other features are clearly not meritorious, and therefore were

sufficient to justify the court in refusing it. It is true that in considering statements made by defendant the jury should consider the whole statement or conversation given, and that any admissions made by defendant should be received with caution, on account of the liability of the witness to forget or misunderstand what was really said or intended. The balance of the instruction, however, is somewhat confusing, and this court is not sure of the interpretation that the jury would have given to it if it had been given as requested. At least it contains the element of instructing the jury that it may give the defendant the benefit of any statements that he may have made in his own behalf. The rule is elementary that evidence of statements in behalf of the party making them is not competent, but only such statements as are made against interest. If this offered instruction is to be interpreted to mean that any statement that defendant may have made in his own behalf shall be considered as evidence in his favor, then the instruction would be clearly erroneous. However, in view of the confusion that might have resulted and the possible misinterpretation of the instruction by the jury if it had been given, the court was warranted in refusing it.

Objection was made by defendant to alleged remarks of [12] the county attorney in his closing argument. In this connection it may be well to remark that the address of the county attorney is not shown in the transcript, nor are any of the portions of it to which objection was made settled in any way by the court. The record merely shows the objections of defendant without any record to which the objections can apply. If appellant desires to have such questions reviewed in this court, the record should show what actually took place, so that there may be no uncertainty as to what the facts in question were. Furthermore, inasmuch as the text of the county attorney's address is not before us, we are unable to determine the connection in which the remarks in question were used. It is universally recognized that a single statement or remark, standing alone, apart and separate from the con-

nection in which it was used, cannot be accurately interpreted. Oftentimes remarks, when separated from the context, are construed to convey ideas just the opposite of those expressed. If the statements were made as set forth in these several objections, we cannot give them a proper construction without the con text, and therefore are unable to say that such remarks were in any way prejudicial to the interests of the defendant.

It is also contended by defendant that in connection with [13, 14] the alleged improper remarks of counsel above discussed, and from evidence contained in the record of unfair methods employed by him in obtaining admissions and confessions from defendant without permitting him to have the benefit of advice of counsel or otherwise advising him as to his rights, and in permitting others to use improper methods in obtaining such admissions and confessions, misconduct on the part of counsel is shown prejudicial to the rights of defendant, and that thereby defendant was deprived of that fair and impartial trial guaranteed him by the Constitution and laws of the state of Montana. The alleged improper methods referred to were the persuasion and inducements which were brought to bear upon defendant to secure from him a statement of the truth in connection with the matter. There is no question but that the so-called "third degree" methods can be carried to the extreme, and when so employed are reprehensible. In this case we do not say that extreme "third degree" methods were used, but, as testified to by Mr. Kaufman, he held out to the defendant certain inducements and strong persuasive arguments in order to secure a statement, particularly as to the location of the money. The statements made having been admissions as hereinbefore pointed out, all the facts and circumstances connected with the making of the statements were admissible in evidence as bearing upon the weight to be given to the statements, and the record discloses that these facts and circumstances were thoroughly brought out. The impropriety of the inducements merely went to the weight of the evidence, and were for the jury to consider in

determining that question, but such impropriety would not constitute a ground for a new trial. The acts that were done cannot be undone, and the facts in regard to such alleged impropriety would be the same upon another trial as upon the trial that has already been had. The interests of defendant in this respect were as fully protected on the trial as he could rightfully demand, and as well as they could be protected on another trial, if granted. There is nothing in this matter whereby it can be said that defendant was deprived of the fair and impartial trial guaranteed him by the Constitution and laws of this state.

Defendant insists that a new trial should be granted on the [15] ground of newly discovered evidence, which newly discovered evidence is set forth in the record by stipulation. As this matter is covered by stipulation, it is safe to assume that the allegations therein made are correct. It appears from this stipulation that after the trial and sentence of defendant it was discovered that Mrs. Agnes Watkins had disclosed to her husband the circumstances of seeing defendant go into the Kleinschmidt building and his strange actions, including the fact that he went into the building with the package, and came out without the package, and as a result of this disclosure her husband and one Frank Smith went to the building and found the money. The money was divided, and a considerable portion of it spent by the Watkinses. Smith, with his share of the money, disappeared, and has never been found. The Watkinses were charged with larceny, and pleaded guilty to the charge. From this stipulation it appears that defendant reaped no profit from the larceny with which he was charged. Inasmuch as the court gave him the maximum sentence in the penitentiary of from seven to fourteen years, without knowledge of the facts revealed by this stipulation, it is contended that, while this newly discovered evidence would not have any effect upon the result of the trial as to whether or not the defendant should be found guilty, yet it would probably have the result of reducing the sentence. However that

may be, which is merely a presumption, yet this court cannot invade the province of the district court in imposing sentence upon him who has been convicted of a crime. That is a matter exclusively within the absolute discretion of the trial court. So far as we know, no case has ever been reversed because the sentence was excessive. If, in view of the newly discovered evidence defendant or his counsel deems the sentence excessive, then his remedy is to appeal to executive clemency, and not to this court. In our view of the case, the newly discovered evidence fits in perfectly with the statement of defendant that he left the money in the Kleinschmidt building, supplemented by the testimony of Agnes Watkins that she observed his actions at the time, and conclusively establishes the guilt of defendant. As suggested in the forepart of this opinion, error prejudicial to defendant must be shown before a new trial can be ordered, and the record fails to show any such error.

The motion to dismiss the appeals is denied, and the judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES COOPER and GALEN concur.

MR. JUSTICE HOLLOWAY: I concur in the result reached, but do not subscribe to all that is said in the foregoing opinion.

Rehearing denied July 18, 1921.

BOLES, APPELLANT, *v.* BOLES, RESPONDENT.

(No. 4,390.)

(Submitted June 4, 1921. Decided June 27, 1921.)

[199 Pac. 912.]

Husband and Wife—Divorce—Alimony—Minors—Custody—Discretion—Presumptions.

Divorce—Alimony—Discretion.

1. Plaintiff, in an action for divorce on the ground of extreme cruelty, had no property in her own right or means of support and was in ill health; the estate of defendant amounted to approximately $20,000 over and above his just debts and liabilities; the court awarded plaintiff $50 per month permanent alimony. *Held*, in view of the provision of section 3677, Revised Codes, vesting in the district court absolute discretion as to the alimony to be paid by the husband, and the fact that the trial court had jurisdiction to modify its order relating to alimony at any time when considered necessary or desirable, that the decree in this respect was not open to reversal in the absence of a showing of abuse of discretion.

Same—Minors—Custody—Discretion—Presumptions.

2. Where the district court found that defendant was a man much attached to his minor children, had at all times provided for them in a suitable manner and taken much interest in their education and general welfare, was a fit and proper person to have their care and custody, that the children had expressed a desire to live with him, and that it was for their best interest that they should be kept and raised together, and therefore awarded their custody to him, subject to the right of the mother to visit them at reasonable times, the presumption obtains, nothing appearing in the record on appeal to the contrary, that the court exercised the discretion lodged in it, and its action will be affirmed.

Appeals from District Court, Hill County, in the Eighteenth Judicial District; T. A. Thompson, Judge of the Eleventh District, presiding.

ACTION for divorce, by Eleanor Marie Boles against Charles Boles. From a judgment for plaintiff and an order denying her motion for new trial she appeals. Affirmed.

---

1. On amount of permanent alimony on absolute divorce, see note in 44 L. R. A. (n. s.) 998.

On power to amend decree of divorce by adding provision for alimony or support of children, see note in L. R. A. 1917A, 325.

2. On denial of custody of child to parent for its well-being, see note in 41 L. R. A. (n. s.) 564.

Mr. Frank E. Carleton, for Appellant, submitted a brief; *Mr. J. N. Thelen*, of Counsel, argued the cause orally.

It is manifest that when making the award of $50 per month as permanent alimony, the court failed to heed the admonition of section 3679, Revised Codes, and entirely failed to take into consideration the "circumstances of the parties respectively." The court found that the plaintiff has no separate property or means of support, and that the defendant is the owner of property and worth approximately the sum of $20,000 over and above all just debts and liabilities. That the award made, in the face of such a finding, is grossly inadequate, seems to us too evident to merit discussion.

In the case of *Muir* v. *Muir* (Ky.), 4 L. R. A. (n. s.) 909, 92 S. W. 314, the court said: "Alimony given upon a decree of divorce becomes the wife's portion in lieu of dower. (*McKean* v. *Brown*, 83 Ky. 208; *Hawkins* v. *Ragsdale*, 80 Ky. 353, 44 Am. Rep. 483.) Where she is entitled to alimony, it would seem to be improper to give her less, in any event, than what her dower interest in her husband's estate would have been." Where a divorce is granted to the wife, the award of alimony should be in such a sum as to leave the wife in at least as good a position pecuniarily after the divorce as she would have been in as a surviving widow. (*De Ruiter* v. *De Ruiter*, 28 Ind. App. 9, 91 Am. St. Rep. 107, 62 N. E. 100.)

In the case of *Wuest* v. *Wuest*, 17 Nev. 217, 30 Pac. 886, the wife was awarded a divorce on the ground of cruelty and the trial court gave to the wife all of the husband's property and in addition required him to pay the sum of twenty dollars per month for the support of an infant child. On appeal this award was affirmed, the court saying: "The statute contemplates that the division of property shall be graduated, among other matters, by the quality of the offense of the delinquent."

Mr. Chas. A. Rose and *Messrs. Norris, Hurd & Hauge*, for Respondent, submitted a brief; *Mr. Edwin L. Norris* argued the cause orally.

MR. JUSTICE GALEN delivered the opinion of the court.

Judgment of divorce was entered in favor of the plaintiff upon the ground of extreme cruelty by the district court of Hill county. Thereby the plaintiff was allowed $50 per month as permanent alimony, and the defendant was awarded the care, custody and control of the children, born as the issue of the marriage, namely: Vesta Marie, aged thirteen years; Jack McCloskey, aged ten years; and Eleanor Usilla, aged eight years; and also Charles Arthur, a legally adopted child, one and one-half years old. The appeal is from the judgment and the order denying plaintiff's motion for a new trial.

Plaintiff assigns four errors, raising but two questions for decision, *viz.*: Did the trial court err (1) in making award of permanent alimony? And (2) in decreeing the care, custody and control of the minor children to the defendant? Both of these questions will be considered together, as both involve inquiry as to whether the district court abused the discretion vested in it by statute, in each instance.

Section 3677, Revised Codes, vests the district court with absolute discretion as to the amount of alimony the husband shall be required to pay, and section 3679 reads as follows: "Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support, during her life, or for a shorter period, as the court may deem just, having regard to the circumstances of the parties respectively; and the court may, from time to time, modify its orders in these respects."

With respect to the care, custody and control of the children of the marriage, the court may, before or after judgment, give such direction as may seem necessary or proper, "and may, at any time vacate or modify" its order. (*Id.*, sec. 3678.) In

awarding the custody of minor children, the court is guided by that which appears to their best interests, and the court in making its determination must consider the temporal, mental and moral welfare of the children, and, if they are of sufficient age to form an intelligent preference, their wishes will be considered by the court. Neither parent, irrespective of the ages of the children, is entitled to their custody as a matter of right. (*Id.*, sec. 3783.)

The trial court found that the plaintiff has no separate [1] property or means of support; that the defendant is the owner of property, and is worth approximately the sum of $20,000 over and above just debts and liabilities; and awarded permanent alimony in the sum of $50 per month, to be paid by the defendant the first of each month, beginning November 1, 1918, and to be continued through plaintiff's life or until the further order of the court. With respect to the custody of the minor children, the court found as follows: "The court further finds that the defendant is a man who is very much attached to his children, has at all times provided for them in a suitable manner, and has at all times and does now take a great interest in their education, and their welfare generally; and is a fit and proper person to have their care, custody and control; that all of the children, with the exception of the younger one, to-wit, Charles Arthur Boles, expressed a desire to live with their father and to remain in his care, custody and control; and that it is for the best interests of said children that they be kept and raised together, and that they remain in the care, custody and control of the father, the defendant herein, subject to the right of the mother, the plaintiff herein, to visit them at all reasonable times, and to have said children visit her for a period of one month during any vacation time."

Judgment was entered that the minor children of the marriage and the adopted child be awarded to the defendant, and placed in his care, custody and control, subject to the right of the plaintiff to visit said children at all reasonable times, and subject to plaintiff's right to have the children visit her at

her home for a period of one month during each year in school vacation, and requiring the children to be kept within the state of Montana and the jurisdiction of the court.

The findings and judgment are amply sustained by the record, although it does not appear that the trial court was overly generous in its award of alimony, in view of the ill health of the plaintiff and the financial ability of the defendant. However, this is a matter which may be remedied at any time when considered necessary or desirable, upon a proper application and showing to the district court, under the provisions of section 3677. The same may be said respecting the custody of the minor children. If the welfare of the children appears to require it, the decree in this regard may also be opened up by the district court and set aside or modified as may appear best. It is now binding between the parties, and will only be changed by the court upon a consideration of the best interests of the minor children.

Under our law the district court is vested with legal discre-

[2] tion in both the award of alimony and the custody of the minor children of the marriage, which will not be interfered with on appeal, unless there has been a manifest abuse thereof. (Nelson on Divorce and Separation, secs. 809, 975; *Cummins* v. *Cummins*, 59 Mont. 225, 195 Pac. 1031; *Blair* v. *Blair*, 40 Utah, 306, Ann. Cas. 1914D, 989, 121 Pac. 19, 38 L. R. A. (n. s.) 269; 19 C. J. 249, 264, 341; 14 Cyc. 805; *Black* v. *Black*, 149 Cal. 224, 86 Pac. 505; *Welch* v. *Welch*, 33 Wis. 534; *Pittman* v. *Pittman*, 3 Or. 553; *Lyle* v. *Lyle*, 86 Tenn. 372, 6 S. W. 878; 9 R. C. L. 285.)

The court granting the divorce is unquestionably the proper tribunal to determine these questions, and our lawmakers have exhibited wisdom in leaving these subjects to the discretionary action of the district court. In consideration of such cases, the court is required to weigh evidence as to the conduct of both parties, the property owned by each, their respective financial burdens, physical strength, earning capacity, moral character and the ages and expressed wishes of the children

over the age of discretion, and that which appears to the best interest of the children, irrespective of the wishes of the parties. The court is further called upon to consider the present and future ability of each of the parents to properly care for, educate and provide for the children, the character and disposition of each of the parents, and many other like considerations, disclosed at the hearing, enter into the final determination.

In the case before us the presumption is that the district court examined into and weighed all such considerations; and, as nothing appears in the record to in any manner overcome the force of this presumption, the order and judgment appealed from are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, COOPER and HOLLOWAY concur.

STATE, RESPONDENT, *v.* MCGLYNN, APPELLANT.

(No. 4,472.)

(Submitted June 1, 1921. Decided June 27, 1921.)

[199 Pac. 708.]

Criminal Law—Sedition—Information—Conclusions — Insufficiency.

Sedition — Information — Conclusions — Inferences — Innuendoes — Insufficiency.

1. Since ultimate facts constituting the crime charged, and not conclusions drawn by the pleader from the facts, must be stated in an information, clauses following each of several alleged seditious utterances explaining and interpreting what defendant meant by the language used, *held* improper in an information charging sedition under Chapter 11, Extra. Session 1918.

Same—Information—Insufficiency.

2. An information charging defendant with saying that the injuries to Belgian children exhibited in the United States were sustained in

[60 Mont. 416.]

factories, and were not the result of German atrocities; that the murder of the Armenians was nothing; that the Armenians were heathens; that it was a mean trick for Germans to mutilate and mangle American prisoners of war, *held* not to charge sedition as defined in Chapter 11, Laws Extra. Session 1918.

Same—Information—Certainty.

3. In view of the provision of section 9149, Revised Codes, requiring that the information must be direct and certain, *inter alia*, as to the particular circumstances of the offense charged when they are necessary to constitute a complete offense, an information charging one with seditious utterances should set forth the fact whether the words were uttered in private conversation with a single person or from a public platform, or were disseminated through the medium of printed articles.

Appeal from District Court, Carter County; George P. Jones, Judge.

J. A. McGLYNN was convicted of sedition, and appeals. Reversed and remanded.

Mr. Harlow Pease, for Appellant, submitted a brief and argued the cause orally.

No appearance in behalf of Respondent.

MR. COMMISSIONER JACKSON prepared the opinion for the court.

J. A. McGlynn, convicted of sedition, appeals from the judgment. No brief or argument was tendered by the attorney general.

Since a reversal must be had on the insufficiency of the information, it is not necessary to consider any other phase of the case.

Omitting its formal parts, the information charged the de-
[1, 2] fendant as follows:

"That at the county of Carter, in the state of Montana, on or about the twenty-ninth day of March, A. D. 1918, and before the filing of this information, the said defendant, J. A. McGlynn, then and there being, did then and there willfully, wrongfully, unlawfully, seditiously, and feloniously, and while the United States of America was engaged in a war with the

German Empire, utter and publish false, disloyal, contemptuous, slurring, and abusive language calculated to bring the form of government of the United States of America and the soldiers and sailors of the United States of America and the Constitution of the United States of America and the flag of the United States of America into contempt, contumely, scorn, and disrepute, and with the intent to interfere with the operation and success of the military and naval forces of the United States of America, and to promote the success of its enemy; that the language uttered and published as aforesaid by the said defendant, J. A. McGlynn, was in substance as follows:

"'I suppose you heard about those Belgian kids that were sent to this country. The Germans never done that [meaning that the injuries and mutilations received by the Belgian children were not caused by the German soldiers]; that it was done [meaning the injuries, mutilations, and maiming caused to the Belgian children] in the factories [meaning the industrial plants], and sent throughout the country [meaning the Belgian children had been sent around different places and exhibited] to create feeling against the German nation [meaning that the Belgian children had been shown to the people of the United States, and that the story of the manner in which their injuries and mutilations were received was false, and that the people were being deceived with false statements for the purpose of inciting among the people of the United States a false impression, with the intent to injure the German nation]; that it was done in Chicago [meaning that the injuries received by the Belgian children were received and caused to said Belgian children in factories in the city of Chicago by American citizens, for the purpose of creating false and untrue sentiment and feeling among the people of the United States of America].

"'That was nothing [meaning the massacre of Armenians by the Germans and Austrians]; they were but heathens [meaning the Armenians, and that the massacre of Armenians was proper and justifiable].

"'That it was a mean trick [meaning that if the Germans did mangle, cut off limbs, and gouge out the eyes of captured American soldiers, that such treatment was good enough for the American soldiers who were fighting Germany].'

"With the felonious and seditions intent in him the said defendant, J. A. McGlynn, then and there to interfere with the operation and success of the military and naval forces of the United States, and to promote the success of Germany, an enemy of the United States of America, and to bring the form of government of the United States of America, the Constitution of the United States of America, the flag of the United States of America, and the soldiers and sailors of the United States of America to contempt, contumely, scorn, and disrepute."

The portions of the charge inclosed with brackets have no proper place in the information. They are inferences or conclusions drawn by the pleader, or, in the words of the defendant, "innuendoes." It is elementary, and needs no citation of authorities, that the ultimate facts constituting the crime, and not conclusions, must be stated in an information. The words themselves, without resort to interpretation or innuendo, must come within the statute as being not only false, disloyal, contemptuous, slurring and abusive, but must likewise be calculated to bring the form of the government of the United States of America, the soldiers and sailors of the United States of America, the Constitution of the United States of America, or the flag of the United States of America, into contempt, contumely, scorn and disrepute, or be uttered or published with the intent to interfere with the operation and success of the military and naval forces of the United States of America, or to promote the success of its enemy or enemies.

The charge relating to defendant's talk concerning the Armenians cannot, by the widest stretch of imagination, have any bearing whatsoever on the United States of America, with reference to the war, nor can it reflect on the loyalty of the defendant. The alleged statement "that it was a mean trick"

is, by the bracketed portion following it, turned from its very evident meaning to express sentiment utterly inconsistent with it. None of the language alleged to have been uttered is in disparagement of the government or soldiers or sailors of the United States. It cannot by any possible construction be considered as calculated to bring the form of government, sailors, soldiers, flag or uniform of the United States into contempt, scorn, contumely or disrepute, nor can an intent to interfere with the success of the military or naval forces of the United States, or to promote the success of its enemy by willfully conveying false reports or statements, be predicated from the charge. A full analysis of the sedition law will be found in *State* v. *Smith,* 57 Mont. 563, 190 Pac. 107, which is conclusive in the determination of this case.

Section 9149, Revised Codes, declares that the information must be direct [3] and certain as to the party charged, the offense charged, and the particular circumstances of the offense charged when they are necessary to constitute a complete offense. In the instant case, if the utterances could by any possible reasoning be construed as a violation of the Sedition Act (Laws Ex. Sess. 1918, Chap. 11), which in our opinion cannot be done, the particular circumstances attendant upon the crime itself should have been set forth, as it is obvious, if uttered in private conversation to a single person, it would have a radically different complexion than if spoken from a public platform, or disseminated through the medium of written articles. (*Fontana* v. *United States* (C. C. A.), 262 Fed. 283; *State* v. *Griffith,* 56 Mont. 241, 184 Pac. 219.)

For the reasons herein stated, we recommend that the judgment be reversed and the cause remanded to the district court, with directions to dismiss the information.

PER CURIAM: For the reasons given in the foregoing opinion, it is ordered that the judgment be reversed and the cause remanded to the district court, with directions to dismiss the information.

Reversed and remanded.

STATE, RESPONDENT, v. TRIPP, APPELLANT.

(No. 4,811.)

(Submitted June 4, 1921. Decided June 27, 1921.)

[199 Pac. 716.]

Criminal Law—Obtaining Money Under False Pretenses—Attempts—Evidence—Insufficiency.

1. Evidence, in a prosecution for attempt to obtain money under false pretenses, showing no more than guilty intent in defendant and preparation to commit the offense charged, *held* insufficient to sustain a conviction.

Appeals from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

CHARLES TRIPP was convicted of an attempt to obtain money by false pretenses, and appeals from the judgment of conviction and from an order overruling his motion for a new trial. Reversed and remanded.

Mr. Kerr Beadle and *Messrs. Canning & Geagan*, for Appellant, submitted a brief; *Mr. Beadle* argued the cause orally.

Citing: *State* v. *Rains*, 53 Mont. 424; *People* v. *Youngs*, 122 Mich. 292, 47 L. R. A. 108, 81 N. W. 114; *Cornwall* v. *Fraternal Accident Assn.*, 6 N. D. 201, 66 Am. St. Rep. 601, 40 L. R. A. 437, 69 N. W. 191; *United States* v. *Stephens*, 8 Sawy. 116, 12 Fed. 52; *State* v. *Hurley*, 79 Vt. 28, 118 Am. St. Rep. 934, 6 L. R. A. (n. s.) 804, 64 Atl. 78.

Mr. Wellington D. Rankin, Attorney General, and *Mr. L. A. Foot*, Assistant Attorney General, for Respondent, submitted a brief; *Mr. Foot* argued the cause orally.

In a case of this kind, it is extremely difficult to say just where preparation ends and overt acts begin. That question must be decided upon the facts of each individual case. 16 Corpus Juris, section 93, page 114, states as a general rule of law the following: "No definite rule applicable to all cases

can be laid down as to what constitutes an overt act or acts tending to accomplish a particular crime. Each case must depend largely upon its particular facts and the inferences which the jury may reasonably draw therefrom." "An overt act, essential to establish an attempt to commit a crime, is an act done to carry out the intention and it must be such as would naturally effect that result, unless prevented by some extraneous cause." (*People* v. *Mills*, 178 N. Y. 274, 67 L. R. A. 131, 70 N. E. 786.)

Appellant had completed every detail of the crime, except to take the complaining witness to the location of the kegs and get his money, and this he was prevented from doing by reason of his arrest, which was an interruption of his plans "by circumstances independent of the will of the attempter."

The actual transaction had been commenced, which would have ended in the crime, had it not been interrupted by the extraneous circumstance of the arrest of the appellant. (*People* v. *Grubb*, 24 Cal. App. 604, 141 Pac. 1051; *People* v. *Paluma*, 18 Cal. App. 131, 122 Pac. 431; *Ex parte Floyd*, 7 Cal. App. 588, 95 Pac. 175.) "The attempt to do an act does not, either in law or in common parlance, imply completion of the act or any definite progress toward it. Any effort or endeavor to effect it will satisfy the term of the law." (*United States* v. *Quincy*, 6 Pet. 445, 8 L. Ed. 458 [see, also, Rose's U. S. Notes]; and see, also, *State* v. *Dumas*, 118 Minn. 776, 41 L. R. A. (n. s.) 439, 136 N. W. 311.)

MR. CHIEF COMMISSIONER POORMAN prepared the opinion for the court.

Appeals from a judgment entered on a verdict of guilty and from an order overruling the defendant's motion for a new trial.

The information filed in the cause charged the defendant with the crime of "an attempt to obtain money by false pretenses," and it is alleged that on the eighteenth day of October, 1920, the defendant, with intent to cheat and defraud

one Maurice Egan, represented to Egan that he (the defendant) was the owner of and had twenty-five gallons of ninety-nine proof whisky, when in truth and in fact the defendant did not have or own twenty-five gallons, or any number of gallons of any kind of whisky whatsoever; that defendant knew that said pretenses were false, and that by color and means of said false representations, or pretenses, defendant then and there knowingly, *etc.*, attempted to unlawfully obtain from said Maurice Egan the sum of $1,100.

It appears from the evidence that on the evening of October [1] 17, 1920, Maurice Egan met the defendant in the city of Butte, being then introduced to defendant by a third party and by agreement then made between the defendant and Egan, defendant was to sell and deliver to Egan twenty-five gallons of whisky, in two little kegs, for the sum of $1,100, the whisky to be tested, money paid, and delivery made on the following evening—that is, October 18, between Second and Front Streets, at about 7 o'clock. It was then agreed that the defendant and Egan would meet on the evening of October 18, and that the defendant would go with Egan to make the test of the liquor. On the evening of October 18, the defendant and the witness Egan met at the appointed time and place, and some further conversation was had between them concerning the whisky. Mr. Egan, in his testimony, says: "Mr. Tripp was going down with me. The two of us were going to walk down to where the whisky was in the wagon. The wagon was to be down there with the whisky. * * * Below the Milwaukee depot we were to meet and walk right close to the Milwaukee. I had no conversation with him as to what was to happen there, only we were to sample the whisky right there, and I was to receive it and give him his money." At this meeting it appears that Egan, who was "driving a buggy," proposed that they drive down to the whisky, but defendant said: "No; we will walk." Egan then went to unhitch his horse, and did not meet the defendant afterward; and we

gather from the evidence that the defendant was arrested at that time.

State's witness Brown testified that on the afternoon of October 18, 1920, he was employed by the defendant to go with the defendant to Nissler and get two of four kegs which defendant and the witness had theretofore placed there, which were dry, and leaking badly; that they filled two of the kegs with water, put a burlap sack around each keg, and "When I got near the Centennial Brewery the kegs were unloaded and left alongside of the road a short distance from the Centennial Brewery."

The defendant at that time had in his possession a brace and bit. Later, on the evening of the same date, the witness Brown went with the officers, took possession of the two kegs, which were found about a quarter of a mile west of Montana Street, and about twenty-five yards off the road. One of the kegs was of ten-gallon capacity, and one of fifteen-gallon capacity, both wrapped in burlap, and filled with colored water. This evidence does not show that defendant delivered the kegs at the place where the test was to be made, or that he went or started to go with Egan to the place of the test, or that he received any part of the consideration, or that he told Egan where he had left the kegs; and it is only by inference that it can be gathered that it was these particular kegs he intended to deliver to Egan. There is evidence that in July, 1920, at Livingston, Montana, the defendant had committed a similar offense in a similar manner, but this only goes to the question of intent. It appears from this evidence that, after making arrangements with the witness Egan to meet him on the following evening, the defendant and Egan did meet at the appointed time and place; but it appears that at the second meeting a new arrangement was made concerning where they were to go to make the test, and that they were to go to that place when Egan had put his horse and buggy away. Defendant did not accompany Egan any distance whatsoever, but remained there, apparently waiting for Egan to return. The

defendant made no move whatsoever after the final agreement relative to the place where the test was to be made.

The supreme court of this state, in *State* v. *Rains*, 53 Mont. 424, 164 Pac. 540, has so fully discussed this proposition that no good would be accomplished by any further discussion. In addition to the cases referred to in *State* v. *Rains*, we will cite the following: *People* v. *Youngs*, 122 Mich. 293, 47 L. R. A. 109, 81 N. W. 114; *People* v. *Petros*, 25 Cal. App. 236, 143 Pac. 246.

The meeting of Egan and the defendant on the evening of the 18th cannot be considered as having any greater significance than to show the completion of the preparations, rather than the commencement of the consummation. Guilty intent and preparation are shown in this record, and nothing beyond that point. The places referred to in the evidence—that is, Second and Front Streets Milwaukee depot, Centennial Brewery—may be places well known to the people residing there, but there is nothing in the record giving us any information as to the relative location of these places or the distance between them, except the statement that the kegs were found a quarter of a mile west of Montana Street.

In *State* v. *Phillips*, 36 Mont. 112, 92 Pac. 299, the question, aside from cautionary instructions considered by the court, was the sufficiency of the information. The information charged that the defendant falsely pretended to be the brother of Charles Phillips, and thereupon sent a telegram, *etc.* Two acts were charged in this information; the falsely pretending to be the brother of Charles Phillips and the sending of the telegram. While the information was somewhat indefinite and incomplete, the court sustained it.

In *State* v. *Taylor*, 47 Or. 455, 8 Ann. Cas. 627, 4 L. R. A. (n. s.) 417, 84 Pac. 82, the court held that the defendant in that cause was charged with the attempt to burn a barn. He engaged two other men to start the fire; he instructed them how to start a slow fire; furnished them with the material; paid them $100; furnished one of them a horse to ride

to the place; and the court held that the furnishing of the material for the fire and furnishing the horse and the payment of the money constituted overt acts on the part of the defendant, justifying his conviction. Both these cases are much stronger than the present case, and we believe it would be a dangerous rule to hold that the act of the defendant in this cause was an overt act amounting "to the commencement of the consummation."

We recommend that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

PER CURIAM: For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause is remanded to the district court of Silver Bow county, with directions to grant the defendant a new trial.

Reversed and remanded.

STATE, RESPONDENT, *v.* DAVIS, APPELLANT.

(Nos. 4,730, 4,741.)

(Submitted June 3, 1921. Decided June 27, 1921.)

[199 Pac. 421.]

Criminal Law—Murder—Change of Venue—Discretion—Local Prejudice—Newspaper Articles—Affidavits—Conclusions—Insufficiency—Insanity—Evidence—Harmless Error—Justification or Mitigation—Proper Instruction.

Murder—Change of Venue—Discretion.

1. An application for change of place of trial of a criminal cause is addressed to the sound discretion of the court, the ruling of which will not be disturbed on appeal unless abuse thereof is shown.

Same — Change of Venue — Local Prejudice — Newspaper Articles — Affidavits—Conclusions—Insufficiency.

2. Where affidavits of counsel for defendant filed in support of

---

2. Weight of newspaper articles as evidence of prejudice against accused entitling him to change of venue, see note in 18 Ann. Cas. 769.

[60 Mont. 426.]

a motion for change of place of trial of a charge of murder did not contain extracts from alleged inflammatory newspaper articles circulated in the county, and the record on appeal did not present the *voir dire* examination of the jurors as tending to show any unusual circumstances in obtaining a jury, the mere statements therein that there had been talk of lynching and that the tale of the crime had been printed in newspapers and generally read by the inhabitants of the county, were bald conclusions and properly disregarded by the trial court.

Same—Exhibits—Identifications—Evidence—Sufficiency.

3. Under the rule that to warrant the admission in evidence of the weapon with which the crime for which defendant is on trial was committed a *prima facie* showing of its identity and connection with the offense is sufficient; clear, certain and positive proof not being required, evidence held sufficient to admit a revolver and the shells with which it was loaded, found near the scene of the crime.

Same—Insanity—Evidence Incidentally Showing Prior Conviction and Escape from Prison—Admisson not Error.

4. Where, in a prosecution for murder, the defense is insanity, every act of defendant in his life is subject to scrutiny; hence the fact that a deputy warden of the state prison was permitted to state while testifying on the question of defendant's sanity that he first met him in the prison as a convict and that he had twice escaped therefrom was not objectionable as an endeavor to prejudice the jury by showing that he had been previously convicted of crime, although he was not charged with prior conviction.

Same—Technical Errors—Insufficient to Reverse Judgment.

5. A conviction will not be set aside for technical errors or defects appearing in the record which do not affect the substantial rights of the accused.

Same—Insanity—Opinion Evidence of Layman—Harmless Error.

6. Error in permitting a layman to give his opinion as to defendant's sanity without having qualified under subdivision 10 of section 7887, Revised Codes, as an intimate acquaintance, was harmless where the only evidence of defendant's insanity consisted of his behavior on the stand and of his incoherent and meaningless answers, all the witnesses testifying to his mental condition declaring him sane, without contradiction or conflict.

Same—Justification or Mitigation—Burden of Proof—Correct Instruction.

7. The contention of defendant that since no one was present when the shot which killed deceased was fired, the court erred in giving an instruction in the words of section 9282, Revised Codes, heretofore construed to mean that if the jury should find the fact that defendant did the killing, the burden of proving circumstances mitigating the offense from murder to manslaughter or justifying it devolves upon him, unless the evidence which proves the killing by the defendant also shows that it was manslaughter or justifiable, *held* without merit.

Appeals from District Court, Beaverhead County; Jos. C. Smith, Judge.

[60 Mont. 426.]

E. C. DAVIS was convicted of murder in the first degree, and appeals from the judgment and an order denying him a new trial. Affirmed.

Mr. W. J. Cushing, Mr. C. W. Robison and *Mr. John Collins,* for Appellant, submitted a brief; *Mr. Collins* argued the cause orally.

The affidavits and testimony offered in support of the motion for change of venue show that the feeling in Beaverhead county was such that defendant could not there obtain an impartial trial. The application was heard immediately before the trial began. A jury was in attendance, and even some members of the jury were discussing the matter freely, and some of them had announced that defendant should have been lynched, that it was too bad that he was ever brought back by the posse alive. It further appears that various newspapers having a wide circulation in the county gave such accounts of the homicide as would prejudice a jury against the defendant. (*State* v. *Spotted Hawk,* 22 Mont. 33, 55 Pac. 1026, and cases cited; *State* v. *Hillman,* 42 Wash. 615, 85 Pac. 63; *State* v. *Dwyer,* 29 Nev. 421, 91 Pac. 305; *State* v. *Olds,* 19 Or. 397, 24 Pac. 394; *People* v. *Suesser,* 132 Cal. 631, 64 Pac. 1095.)

It was error to permit the gun which was found at Monida to be introduced in evidence; the record fails to disclose how long prior to the homicide it was found. (*People* v. *Hill,* 123 Cal. 571, 56 Pac. 443; *State* v. *Kehr,* 133 Iowa, 35, 110 N. W. 149.)

No witness was present at the killing; the evidence upon which defendant was convicted was therefore purely circumstantial, and whether defendant did or did not commit the homicide was a vital issue to be determined by the jury. The court, however, instructed the jury that defendant had committed the act, or at least instructed them that they might so assume. Possibly that instruction might pass if defendant had confessed the killing and relied only upon self-defense or insanity, or other excuse; but where, as here, the act of killing

as well as defendant's sanity is in issue, that instruction has no possible application. (*Barrow* v. *Territory*, 13 Ariz. 302, 114 Pac. 975; *People* v. *Matthai*, 135 Cal. 442, 67 Pac. 694; *Territory* v. *Tunnell*, 4 Mont. 148, 1 Pac. 742; *Territory* v. *Johnson*, 9 Mont. 21, 22 Pac. 346; *State* v. *Sloan*, 35 Mont. 367, 89 Pac. 829; *State* v. *Allen*, 34 Mont. 403, 87 Pac. 177.)

Mr. Wellington D. Rankin, Attorney General, and *Mr. L. A. Foot*, Assistant Attorney General, submitted a brief; *Mr. Foot* and *Mr. T. E. Gilbert*, County Attorney, argued the cause orally.

The publishing of accounts in newspapers pretending to give the facts of the crime, if not inflammatory in their nature, are not sufficient to justify granting a change of venue. (*State* v. *Brown*, 130 Iowa, 57, 106 N. W. 379.) It is a presumption of law that the defendant can have a fair and impartial trial in the county where the offense was committed, and the burden is upon him to show clearly otherwise (*Johnson* v. *State*, 1 Okl. Cr. 321, 18 Ann. Cas. 300, 115 Pac. 1059), and that the prejudice existing in the county is such that its natural tendency will be to intimidate or swerve the jury. (*State* v. *Gordon*, 32 N. D. 31, Ann. Cas. 1918A, 442, 155 N. W. 59.) An application for a change of venue in a criminal case is addressed to the sound discretion of the court, and its refusal is not reversible error, unless it appears from the facts presented on the application that the court acted unfairly, or that there was a palpable abuse of judicial discretion. (16 C. J., sec. 306, p. 204; *People* v. *Riggins*, 159 Cal. 113, 112 Pac. 862; *People* v. *Elliott*, 80 Cal. 296, 22 Pac. 207; *State* v. *Nelson*, 91 Minn. 143, 97 N. W. 652; *Jahnke* v. *State*, 68 Neb. 154, 94 N. W. 158.)

Appellant was seen with a pistol in his hands immediately after two shots were fired; a pistol was found not far from the scene of the homicide that agreed in caliber and make with empty shells found at the scene of the homicide; loaded shells of the same caliber and make of the pistol and the empty shells

were found in appellant's possession; appellant admitted that he threw away the pistol to which the shells belonged. These items are all so closely connected with the homicide as to practically remove all doubt that the pistol found was the one seen in the hands of appellant and the weapon that caused the death of the deceased, and were properly admitted as evidence. (*People* v. *Byrne*, 160 Cal. 217, 116 Pac. 521; *Fuller* v. *State*, 147 Ala. 35, 41 South. 774; *State* v. *Laudano*, 74 Conn. 638, 51 Atl. 860; *Boynton* v. *State*, 115 Ga. 587, 41 S. E. 995; *State* v. *Aspara*, 113 La. 940, 37 South. 883.)

MR. COMMISSIONER JACKSON prepared the opinion for the court.

The defendant was convicted of murder in the first degree on May 19, 1920, and on May 24 he was sentenced to be hanged. From the judgment of conviction, and from an order denying his motion for a new trial, he appeals.

Before the trial was begun, the defendant applied to the trial court for a change of place of trial. The motion was denied, and defendant predicates error. In support of the petition are the affidavits of W. J. Cushing and C. W. Robison, both counsel for the defendant. Briefly, the affidavits state that the arrest of the defendant was made by a *posse commitatus*, consisting of from fifty to one hundred armed men; that at the time of the arrest, and subsequently, it was freely remarked by various members of the posse and others that defendant should be lynched; that the newspapers of the county and the papers of Butte, Montana, which have a large circulation in Beaverhead county, published statements concerning the defendant and the manner of the commission of the alleged crime and the arrest of the defendant, which statements were generally read by the people of the county of Beaverhead; that, on account of the statements and articles, the people of Beaverhead county were so prejudiced against the defendant that he could not have a fair trial in the county, and belief was expressed that it was impossible to obtain a jury in the county

that had not formed an opinion as to the guilt or innocence of the accused, such as would disqualify them as jurors.

A hearing was had on the petition, Messrs. Cushing and Robison being the only persons to testify. Mr. Robison's evidence went solely to the talk he had heard, and that of Mr. Cushing, in addition to the talk, went to the effect that the newspapers of the county "published somewhat of an extended statement of the commission of this crime and the facts leading up to the arrest and confinement of the prisoner." Both witnesses stated they believed it would be impossible to secure a fair trial or to secure an unprejudiced jury in the county. No counter-affidavits nor proof were offered by the state.

The Constitution guarantees to everyone charged with a [1, 2] crime a fair trial before an impartial jury, and it is settled law in this jurisdiction that an application for change of place of trial is addressed to the sound discretion of the trial court, and, unless an abuse of this power is shown, its ruling will not be disturbed. (*State* v. *Spotted Hawk*, 22 Mont. 33, 55 Pac. 1026, and cases there cited.) No extracts from the newspapers were attached to the affidavits, and the record is silent as to what the stories contained. The bald statement that the tale of the crime was printed in newspapers and generally read by the inhabitants of the county, and that therefore the defendant would be deprived of his constitutional right of fair trial by an impartial jury, is a flat conclusion, and was properly disregarded by the trial court. (*State* v. *Spotted Hawk, supra; Territory* v. *Manton*, 8 Mont. 95, 19 Pac. 387.) No fact in the affidavits or testimony appears to move judicial discretion, save the statements that there had been talk of lynching the defendant, and its effect upon the popular mind.

It must be borne in mind that, while the defendant had been arrested by an armed posse, and at a time when feeling was intense, the inviolability of his person was observed, and in accordance with the high concept of respect for justice the law was permitted, without let or hindrance, to take its course. Naturally, whenever a brutal crime has been committed, there

are many whose unbridled tongues vent emotion, but it does not follow that a community's judgment is warped. The record does not disclose the *voir dire* examination of the jurors, but it suffices to say that, when a jury is obtained on a homicide case after the examination of but fifty-six men, and no unusual condition is apparent, the statement as to prejudice and the impossibility of securing a fair and impartial jury falls. The showing is entirely insufficient to permit this court to disturb the ruling of the lower court in denying the motion.

"The trial judge is generally familiar with the local situation; he knows the prevailing sentiment of the people, in so far as it finds oft-repeated expression; he knows all the facts and circumstances proper to be considered in determining the matter; he may know the persons who make affidavits suggesting undue excitement or prejudice, and can properly estimate the weight to be given such affidavits. A judicial discretion exercised under such circumstances should not be interfered with, unless its abuse is so clearly manifest as to call for a reversal." (*State* v. *Welty,* 65 Wash. 244, 118 Pac. 9; see, also, *State* v. *Caseday,* 58 Or. 429, 115 Pac. 287; *Johnson* v. *State,* 1 Okl. Cr. 321, 18 Ann. Cas. 300, 97 Pac. 1059; *People* v. *Elliott,* 80 Cal. 296, 22 Pac. 207; *Jahnke* v. *State,* 68 Neb. 154, 94 N. W. 158, 104 N. W. 154.)

It appears that shortly after noon on April 21, 1920, C. K. Wyman, sheriff of Beaverhead county, in response to a telephoned request from J. B. Egan, of Monida, came to the latter place from Dillon, Montana, to arrest the defendant, accused of the theft of a bridle. Egan, in order to keep the defendant until the sheriff arrived, had engaged him to remove some carcasses from a corral. On his way from the train, the sheriff was met and accompanied to the hotel by the witness Raymond W. Knott. When they entered the place the defendant was pointed out to the sheriff, who tapped him on the shoulder and informed him he was under arrest. The defendant said, "All right," picked up his hat, and added, "I

have a coat out in the cabin, and I would like to get that." The sheriff and defendant then went out the front door of the hotel, and turned to the left. Knott left by the same door immediately after they had gone, turning to the right, and walking down the street until he came to the front entrance of the Egan store, a distance of about 200 feet from the hotel, where he met a man named Robbins, and heard the sound of two shots. He ran back on the same street a short distance from the store, and, looking down an alley, saw the defendant, gun in hand, standing about three feet in front of Wyman, whose back was toward witness, and who was then staggering. Knott testified: "It could not have been more than a few seconds from the time I heard the shots until I got into the position I indicated at the gate, where I could see Mr. Wyman and the defendant Davis, because I ran the twenty feet or so that was between me and the alley." The witness then ran back into the store, told those who were there that the sheriff had been shot, went out the rear door and around an oil house, to the point where he had seen the defendant and Wyman. The defendant had disappeared, and Wyman was lying on the ground. The witness roused him, asked him what had happened, and the wounded man answered: "He shot me," Knott then left Wyman, went back into the store, reported the sheriff was dead in the alley, picked up a rifle, and went out with others after the defendant. From this point his testimony is: "I saw the defendant after that. In fact, I saw him practically all the time, because we were trailing him until he got to the cabin. I saw the defendant on horseback the next time after I had seen him standing near Wyman with a gun in his hand; at that time he was in the corral. At that time the defendant would be to the left of the door marked 'F.' When I saw the defendant he was on his horse, and was trying to make it jump the bars, jump the corral at the point marked 'Bars' on the map, State's Exhibit No. 1. I just saw the defendant for an instant then. He was still on horseback the last time I saw him. The next time I

saw the defendant he was running down the railroad track. At that time he was right on the track. There is a railroad Y in there, and he was crossing the Y. The defendant, at the time I saw him on the track, was running in this direction, which, according to the map, would be northwest. He was running on the right-hand side of the track at that time; that would be as you look down the track from Monida, toward Dillon. Mr. Robbins was with me at that time. Mr. Robbins and I struck out to the right of him, trying to circle around the defendant. I had a rifle at this time. I did not use my rifle at that time. Mr. Robbins did not use his at that time either. Mr. Robbins used his rifle in the corral. I was not present the first time that Mr. Robbins shot. I said that Mr. Robbins and I started to follow the defendant. I imagine we went one-eighth of a mile from the railroad track out through the hills with the intention of cutting him off at the bend in the track. That would be about northwest of Monida; it would be more northerly than the track runs. After that time we kept the defendant in sight. We did that by following him. Mr. Robbins and Mr. Miller were in the party at that time. As a rough estimate, I would say that we were separated from the defendant from one-quarter to a half of a mile. I know that Mr. Miller had some glasses with him that day. Mr. Miller had a pair of high-powered binoculars with him at that time that he used. I could see the defendant myself most of the time. We followed the defendant in this northwesterly direction from Monida for about one mile. At that time we saw the defendant off to the left of the track after we got up on top of the hills. When we saw the defendant to the left of the track, he was traveling in a southwesterly direction. Mr. Robbins and I were still following him. We followed the defendant until we came to the cabin the defendant was in. That is the same cabin in which the posse captured him."

The defendant was arrested that afternoon by Dan Mooney, the under-sheriff of the county, who had gone to the cabin

with a posse, and found it already surrounded by others. The defendant, who was in the cellar, was armed with a 30–30 Winchester carbine. He inquired "if there was a sheriff outside," and, upon being informed that there was, he said, "All right; let the law take its course." After the arrest, the defendant was searched, and sixteen 32-caliber automatic shells were taken from his person. When asked where his 32-automatic pistol was, he said he had none; later he said he "ditched it," and then said, "I threw it away." Finally, he claimed to have buried it in the cellar of the cabin, between the floor and top of the cellar. The cellar was searched, but the pistol not found there. Witness Knott testified to the finding of a 32-automatic Colt pistol. "Exhibit No. 4, marked for identification for the state, is a 32-automatic Colts. I have seen that before. It is the gun I brought down here from Monida. This gun was found in Monida by Mr. Robbins and myself. I first saw this gun at Monida. I saw it back of the warehouse, the lower barn. It would be northwest of the lower barn. When I first saw the gun it was lying on the ground. Mr. Robbins picked the gun up. I was present at that time. At that time the gun was taken to the store by Mr. Robbins. Mr. Robbins handed the gun to Mr. Egan, and Mr. Egan give it to me to put in the safe. I later removed it from the safe. When I removed it from the safe I brought it down to Dillon. At Dillon I delivered it to the sheriff's office. I delivered the gun to the same officer I delivered the shells to." On the day following the tragedy, Knott, H. K. Robbins and J. B. Egan, making a search at the scene of the crime, found two empty 32-caliber automatic shells, which were in evidence at the trial.

In specifications 2 and 3, defendant urges error in the [3] admitting, over objection, the pistol and the shells with which it was loaded when found. In our opinion there is no merit to this contention, as there was ample evidence connecting the defendant with the exhibits. In fact, the incidents are all so closely connected with the homicide as to foreclose

doubt; two shots were heard; defendant was seen with a gun in his hand a few seconds later, standing in front of the sheriff, who was staggering about wounded; the injured man said, "He shot me"; two empty 32-caliber automatic shells were found very close to where they had been standing; sixteen loaded shells of the same kind and caliber were discovered on the person of the defendant; defendant's own admission that he had thrown a 32-caliber automatic pistol away, and the finding and delivery to the officer of the gun and its load.

"To warrant the admission in evidence of an instrument or weapon as the one with which the crime was committed, a *prima facie* showing of identity and connection with the crime is necessary, and sufficient; clear, certain, and positive proof is not required." (16 C. J. 618, 619, and cases there cited; *People* v. *Byrne*, 160 Cal. 217, 116 Pac. 521, 530.)

Defendant in his case sought by his actions and answers on the stand to bring his sanity in question. When interrogated, his responses were incoherent and meaningless. The two guards who had been employed to watch the defendant, one from the 24th and the other from the 29th of April, up to and including the time of the trial, also were called on his behalf, and after relating his actions and talk while in confinement, which they said were about the same as when on the stand, both declared him to be sane in their opinions. This was the defendant's entire case, and, as will be seen, there is not a scintilla of proof tending to show mental weakness, save his own demeanor. In rebuttal, together with under-sheriff Mooney, Walter Nesbit and J. B. Egan, the state produced Drs. Scanland, Bolton and MacMillan, with wide experience as experts on mental diseases. They testified from actual physical tests and observation of the defendant that he was sane, and simulating mania. In fact, his simulating was demonstrated to the jury when, as Dr. Scanland, among other symptoms, related that maniacs are given to singing and crying out occasionally, the defendant, who had not done so before,

became exceedingly boisterous, and cried out. Mooney, the under-sheriff, testified to the conversation he had with the defendant after his arrest by the witness and the posse, in which defendant talked and acted rationally, detailing the arrest by the sheriff, Wyman, denying he had seen Wyman after they left the hotel, and relating that he was going to ride his horse to Dillon, but changed his mind, and decided to hunt jack-rabbits, and that he had gone to the cabin, where he was captured, to cook a meal.

In assignments 4 and 5, error is alleged, in that, over ob-
[4] jection, the witness Nesbit, called in rebuttal, was permitted to answer the question: "Was he sent there [to prison] for a crime?" and in overruling the objection to the same witness referring to a commitment to fix the date of defendant's second escape from the state prison. It is argued at some length that the defendant was not charged with a prior conviction, and that it could not in any case be proved by the oral testimony of the witness, and that, under the pretext of refreshing his memory by looking at the commitment, the purpose was to prejudice the jury.

Counsel mistook the situation. The witness Nesbit was the assistant deputy warden of the Montana state prison, who had known the defendant under the name of Albert Yek, as a convict in the prison from June, 1913, until March 21, 1920, and saw and observed him every day during that time, except during two short intervals, aggregating about two months, during which time Yek was a fugitive, having escaped from prison. His testimony was entirely on the sanity phase of the case, and he testified the defendant was sane. No objection was made to his qualifications under subdivision 10, section 7887, Revised Codes. He had already testified without objection: "That man's name is Albert Yek. I first met that man in June, 1913. At that time he entered the prison." This was sufficient to apprise the jury that the man had been a convict and the question objected to could not operate to the prejudice of the defendant. As was aptly stated by the trial judge,

defendant's sanity being in question, every act of his life was subject to scrutiny, and if it fell within prison walls it would have to be followed there. "To judge the mental deficiency of a person, the entire conduct of the individual through life may be taken into account." (*St. George* v. *Biddeford*, 76 Me. 593; *State* v. *Colbert*, 58 Mont. 584, 194 Pac. 145.) Later in his testimony, from his independent recollection, the witness said: "At the time I observed the actions of the defendant, at the time he was in the penitentiary, they were just the same as any other person in there. The defendant was at the state prison from June, 1913, until in November, when he escaped. The defendant was finally discharged from the state prison on March 21, 1920. He escaped some time in November, 1913. He was later captured in Washington. After the defendant was captured he was brought back to the Montana state prison. He was returned to the prison in January, 1914. From January, 1914, until March 21, 1920, the defendant was at the state prison at Deer Lodge, Montana, as a prisoner. The defendant made one other escape. In order to give the date of the escape, I would have to look at the commitment"—all of which presented to the jury the knowledge witness had of defendant's actions, and his opportunity for observation. The date of the second escape was immaterial. It was already in [5] evidence defendant had escaped twice. By no course of reasoning can prejudice be predicated, since the testimony was entirely directed to the defendant's mental condition and the witness' time and opportunity for observing his actions. "For many years this court has uniformly adhered to and enforced the rule that a conviction will not be set aside for technical errors or defects appearing in the record which do not effect the substantial rights of the accused." (*State* v. *Brooks*, 57 Mont. 480, 188 Pac. 942.) There is no merit to assignments 4 and 5.

The sixth assignment was that the court erred in permitting [6] to be given opinion evidence of defendant's sanity by a layman, J. B. Egan, who, according to the record, had seen,

talked with, and employed the defendant on the day of the homicide. Obviously, the witness had not qualified under subdivision 10, section 7887, Revised Codes, in that he did not come within the sphere of intimate acquaintanceship; but while the court erred in admitting his opinion, the error was harmless under all the circumstances of the case. In *State* v. *Penna*, 35 Mont. 535, 90 Pac. 787, relied on by defendant, there was much conflicting evidence as to the mental condition of the accused, and the court properly held that, under circumstances as presented at the trial, it was prejudicial error to admit the testimony of news-writers who had not qualified under the intimate acquaintanceship statute. In *State* v. *Leakey*, 44 Mont. 354, 120 Pac. 234, also cited by the defendant, the court correctly held that, in conjunction with other errors, the trial court erred in permitting the witness George Albert to express an opinion that the defendant was sane. In this case, likewise, was there much evidence conflicting in character as to the prisoner's sanity. But every case must be judged in the light of its individuating characteristics, and upon its own peculiar facts and circumstances. No parallel can be drawn between the cases cited and this case. If all of the evidence in the instant case did not point unerringly to but one conclusion, this court might have to reverse the judgment, and order a new trial.

The state in its case in chief unquestionably established a state of facts that would support the verdict. The burden then devolved upon the defendant to prove circumstances of mitigation, or that would justify or excuse the act. This the defendant did not do, save by exhibiting to the jury his demeanor on the stand, and by incoherent answers. All of the witnesses in this case who testified as to the mental condition of the accused declared him sane. Therefore, there being no contradictory or conflicting evidence, we hold that, while the opinion evidence of the witness Egan was error, the defendant was not injured, and cannot complain. "It is further claimed the court erred in allowing proof to be made of the fact that

a number of fires were set by Warrick and the defendant after the pile of baled hay was kindled, and on the same night. Conceding that proof of after-committed offenses is not admissible in support of a criminal charge, we feel wholly justified in this case in resolving the error against the defendant, for the reason that upon the whole case we think that the conviction was just, and that there has been no miscarriage of justice." (*People* v. *Wilkinson*, 30 Cal. App. 473, 158 Pac. 1067.)

"Conceding error, and that the objection was properly raised in time, under the whole evidence, which was practically without dispute, and uncontradicted as to any part or particular, no such prejudice could have been worked to defendant's rights as would amount to a miscarriage of justice." (*People* v. *Warr*, 22 Cal. App. 663, 136 Pac. 304.)

The defendant then contends that, since no one was present [7] at the actual firing of the shots that killed Wyman, the court erred in giving the following instruction: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable."

This instruction is the statute of the state (sec. 9282, Rev. Codes), and was construed in *Territory* v. *Manton, supra:* "It means that if the jury find the fact of the killing, and that the prisoner did it, then the burden of proving circumstances which mitigate the offense from murder to manslaughter, or justify the killing altogether, will devolve on the accused, unless the very evidence itself which proves the killing, and that it was done by the prisoner, also shows it was manslaughter, or justifiable homicide." (See, also, *State* v. *Colbert, supra.*) The jury in this case was fairly and properly instructed, and no error was made in giving the instruction complained of.

Specifications 8 and 9, alleging error in denying defendant's motion for a new trial and entering judgment, are disposed of in deciding the merits of the other assignments.

For the reasons herein stated, we recommend that the judgment of conviction and the order denying a new trial be affirmed.

PER CURIAM: For the reasons given in the foregoing opinion, the judgment of conviction and the order denying a new trial are affirmed.

Affirmed.

STATE, APPELLANT, v. STEIN, RESPONDENT.

(No. 4,618.)

(Submitted June 2, 1921. Decided June 27, 1921.)

[199 Pac. 278.]

Criminal Law—Intoxicating Liquors—New Trial—Newly Discovered Evidence — Verdicts—Impeachment by Jurors—Witnesses—Credibility—Impeachment—Former Conviction of Misdemeanor.

Criminal Law—Witnesses—Former Conviction of Misdemeanor—Improper Cross-examination.

1. *Held*, that the provision of section 8907, Revised Codes, to the effect that the conviction of a person of any offense may be proved for the purpose of affecting the weight of his testimony, refers to conviction for a felony, and that therefore refusal to permit cross-examination of a witness for the state as to his former conviction of a misdemeanor was proper.

Same—Misconduct of Jury—Verdict—Impeachment by Affidavit.

2. Since a juror may not impeach his verdict directly by affidavit, impeachment thereof is not permissible by the affidavit of another detailing admissions and declarations made by the juror after trial showing that he was prejudiced while acting as such.

---

1. What constitutes "crime" for conviction of which witness may be impeached, see note in **Ann. Cas.** 1916A, 274, 279.

On the question as to whether cross-examination is proper mode of proving conviction of crime for purpose of impeachment, see notes in 30 **L. R. A. (n. s.) 846; 6 A. L. R.** 1608.

[60 Mont. 441.]

Trial—Pleadings—Motions—Nature of—How to be Determined.

3. In determining the character of pleadings, motions and other papers filed in an action, the object sought to be attained is controlling.

Criminal Law—New Trial—Newly Discovered Evidence—Rule.

4. Where alleged newly discovered evidence is merely cumulative and designed to impeach the credibility of a witness further than it had already been impeached, a new trial cannot be granted.

Same—New Trial—Motion Based on Documentary Evidence—Review on Appeal.

5. As a rule the supreme court is more reluctant to set aside an order granting than one refusing a new trial, but where the motion was based entirely upon documentary evidence, it is in as advantageous a position to pass upon its merits as was the trial court, and will set aside the order if from the record it is unable to ascertain upon what theory the motion could have been granted.

Appeal from District Court, Custer County, in the Sixteenth Judicial District; C. C. Hurley, Judge of the Seventh District, presiding.

HENRY STEIN was convicted of violating the prohibition law, and from an order granting new trial, the state appeals. Order reversed and cause remanded, with directions to enforce judgment.

Mr. S. C. Ford, Attorney General, *Mr. Otto A. Gerth,* Assistant Attorney General, and *Mr. Frank Hunter,* for Appellant, submitted a brief; *Mr. L. A. Foot,* Assistant Attorney General, and *Mr. Hunter* argued the cause orally.

Mr. Sharpless Walker, for Respondent, submitted an original and a supplemental brief and argued the cause orally.

Where a witness upon whose testimony the state's case is dependent has been promised money by the prosecution for testifying, or where he has been arrested and imprisoned and is promised his liberty if he testifies, and those facts were unknown to the defendant at the time of trial, it is ground for a new trial when discovered and presented on motion after verdict; likewise where objection is made to a question on cross-examination and testimony is excluded as to the pecuniary interest of a prosecuting witness in the conviction of a defendant. (*People* v. *Langtree,* 64 Cal. 256, 30 Pac. 813;

People v. *Halpin*, 276 Ill. 363, 114 N. E. 932; *State* v. *Carroll*, 85 Iowa, 1, 51 N. W. 1159; *Commonwealth* v. *Sacket*, 39 Mass. (22 Pick.) 394; *People* v. *Rice*, 103 Mich. 350, 61 N. W. 540; *State* v. *Lee*, 26 Minn. 262, 3 N. W. 345; *Barron* v. *Jackson*, 40 N. H. 365; *State* v. *Mulch*, 17 S. D. 321, 96 N. W. 101; 40 Cyc. 2658.)

If a juror on his *voir dire* examination denies that he is prejudiced toward the defendant, or denies that he has formed or expressed an opinion as to defendant's guilt, and later it appears by affidavits on motion for new trial that the juror's answers were not true and that he was biased and prejudiced, or that he had formed and expressed an opinion as to the defendant's guilt, and that the defendant and his counsel were ignorant of those facts and could not have discovered them with reasonable diligence, a new trial should be granted. (*State* v. *Brooks*, 57 Mont. 480, 188 Pac. 942; *State* v. *Mott*, 29 Mont. 292, 74 Pac. 728; *Territory* v. *Chartz*, 4 Ariz. 4, 32 Pac. 166; *State* v. *Wright*, 112 Iowa, 436, 84 N. W. 541; *State* v. *Woods*, 49 Kan. 237, 30 Pac. 520; *State* v. *Button*, 50 La. Ann. 1071, 69 Am. St. Rep. 470, 23 South. 868; *Commonwealth* v. *Won Chung*, 186 Mass. 231, 71 N. E. 292; *Spradlin* v. *State*, 13 Okl. Cr. 376, 164 Pac. 990; *State* v. *Lauth*, 46 Or. 342, 114 Am. St. Rep. 873, 80 Pac. 660; *State* v. *Thompson*, 24 Utah, 314, 67 Pac. 789; *Schissler* v. *State*, 122 Wis. 365, 99 N. W. 593; *State* v. *Swaford*, 88 Wash. 659, 153 Pac. 1056; 12 Cyc. 716; 16 Corpus Juris, 1154, 1159.)

Respondent is relying upon misconduct of the jury, to-wit, that three jurors qualified on their *voir dire* examination and said that they were not prejudiced against the defendant, when in fact they were prejudiced and disqualified. That a new trial will be granted where it appears that the jurors were prejudiced clearly appears from *State* v. *Brooks*, 57 Mont. 480, 487, 188 Pac. 942.

Appellant cites *Siemsen* v. *Oakland Ry.*, 134 Cal. 494, 66 Pac. 672, wherein the court holds that what a juror could not directly do, could not be indirectly done by a third person.

However, that rule has not been announced in Montana. In conflict with the California case are numerous cases; some holding that the rule denying the competency of affidavits of jurors, or the statements of jurors, applies only where it is sought to impeach a verdict because of the conduct of a juror while in the jury-room deliberating upon the verdict, and not to cases where such affidavits relate to statements or conduct of a juror outside of the jury-room; and others, holding that matters occurring even in the jury-room, but which do not essentially inhere in the verdict, are competent. (*Mattox* v. *United States*, 146 U. S. 140, 36 L. Ed. 917, 13 Sup. Ct. Rep. 50 [see, also, Rose's U. S. Notes]; *Morse* v. *Montana Ore-Purchasing Co.*, 105 Fed. 337; *Johnson* v. *Witt*, 138 Mass. 79; *Twaddle* v. *Mendenhall*, 80 Minn. 177, 83 N. W. 135; *Heffron* v. *Gallupe*, 55 Me. 563; *West Chicago St. R. Co.* v. *Huhnke*, 82 Ill. App. 404; *Maryland Gas Co.* v. *Seattle Elec. Co.*, 75 Wash. 430, 134 Pac. 1097; *Carter State Bank* v. *Ross*, 52 Okl. 642, 152 Pac. 1113; *Slater* v. *United T. Co.*, 157 N. Y. Supp. 909, 172 App. Div. 404.)

If a witness testifies in a criminal or civil proceeding, his conviction of any criminal offense may be proved for the purpose of affecting the weight or credibility of his testimony, and a conviction may be shown either by the record or by cross-examination of such witness. (Sec. 8907, Rev. Codes; *Koch* v. *State*, 126 Wis. 470, 5 Ann. Cas. 389, 3 L. R. A. (n. s.) 1086, 106 N. W. 531; *State* v. *Adamson*, 43 Minn. 196, 45 N. W. 152; *Lewis* v. *State*, 85 Miss. 35, 37 South. 497; *State* v. *Heussack*, 189 Mo. 295, 88 S. W. 21; *State* v. *Deal*, 52 Or. 568, 98 Pac. 165; *Missouri, K. & T. Ry. Co.* v. *Johnson*, 34 Okl. 582, 126 Pac. 567; *Amonett* v. *State*, 83 Tex. Crim. 587, 204 S. W. 438.)

A much stronger showing on appeal is required to set aside an order granting a motion for new trial than to justify a reversal where a new trial has been denied, for the reason that granting a new trial places the parties in their original position, while a denial of a new trial concludes their rights.

(*State* v. *Schoenborn*, 55 Mont. 517, 179 Pac. 294; *Morgan* v. *Los Angeles Pac. Co.*, 13 Cal. App. 12, 108 Pac. 735; *Ellyson* v. *Peden* (Iowa), 146 N. W. 759; *Commonwealth* v. *Metcalf*, 184 Ky. 540, 212 S. W. 434; *James* v. *Coleman* (Okl.), 166 Pac. 210; *Alderson* v. *Larson*, 28 S. D. 369, 133 N. W. 809.)

MR. COMMISSIONER SPENCER prepared the opinion for the court.

The defendant was convicted in the district court of Custer county of a violation of the prohibition law. Subsequently his motion for a new trial was granted, and the state has appealed from that order.

It appears in the evidence that at various times between January 21 and February 1, 1919, one Charles Marsant had gone to the store of the defendant in Miles City and purchased liquor. These various transactions were consummated by the ingenious method of the purchaser laying his money on the counter and the defendant placing the bottles of whisky on the floor at the end of the counter, so the purchaser could help himself, the defendant evidently figuring that if he did not hand the bottles of liquor directly to the purchaser he would thereby evade the law, even though in each instance he received the money. The defendant charged seventy-five cents for each six-ounce bottle of the liquor. On the first day of February, and after several purchases had previously been made from the defendant, the sheriff gave Marsant four dollars in silver, so marked as to be later identified, with which Marsant was to buy whisky from Stein. Marsant did buy the whisky from the defendant, and that same night, acting under authority of a search-warrant, the sheriff, with his assistants, raided and searched the store of the defendant and procured a quantity of whisky and one silver dollar, which was identified as one of the marked coins earlier given to Marsant. The record contains evidence of one other witness who testified to buying liquor from the defendant about the same time and under similar circumstances. The defendant predicated his

motion for a new trial upon the statutory grounds, but urged in particular newly discovered evidence, misconduct of the jury, and error upon the part of the court in refusing to allow him to cross-examine the state's witness Marsant as to his former conviction of a misdemeanor. The court based its order granting a new trial upon the two grounds of newly discovered evidence and misconduct of the jury. But, irrespective of the grounds upon which the trial court based its ruling, an examination of the record must be made to see if the ruling of the court below can be sustained upon any ground.

The respondent herein very earnestly contends that he was [1] deprived of a substantial right by the refusal of the court to allow him to cross-examine the state's witness Marsant as to a former conviction of a misdemeanor, and claims his privilege by virtue of the provisions of section 8907 of the Revised Codes. A cursory examination of this section appears at first to disclose a conflict with the provisions of section 8024, Revised Codes, and offers a basis for the contention of respondent. The two sections last quoted read as follows: "8024. A witness may be impeached by the party against whom he was called, by contradictory evidence, or by evidence that his general reputation for truth, honesty, or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he has been convicted of a felony." "8907. A person convicted of any offense is notwithstanding a competent witness in any cause or proceeding, civil or criminal, but the conviction may be proved for the purpose of affecting the weight of his testimony, either by the record or by his examination as such witness." More detailed investigation, however, disposes of the apparent conflict, and makes the two sections harmonious. A solution necessitates reference to the preceding sections to disclose the harmony and gather the intention of the legislature. (Rev. Codes, secs. 7875, 7876.) Section 8904 is in a measure declaratory of the ancient common-law principle that one convicted

of treason or any felony thereupon became deprived of all civil rights. As stated by Chitty: "He is disqualified from being a witness, can bring no action, nor perform any legal function, he is, in short, regarded as dead in law." (See 14 C. J. 913.) Section 8905 provides that one imprisoned for life is deemed civilly dead. These two sections have to do wholly with the status of a convict, and, standing alone, would deprive the felon of all of his civil rights and disqualify him from being a witness or performing any legal function. Having this in mind, then, the legislature enacted the following restorative section, 8906, Revised Codes, whereby the convict was restored to life for the purpose of conveying his property, and with the same object in view enacted section 8907, whereby the convict was further restored, so as to become competent as a witness in any case, either civil or criminal, and further providing that the conviction may be proved either by the record or his examination as a witness for the purpose of affecting the weight of his testimony. True, section 8907, *supra*, says a person convicted of any offense is, notwithstanding, a competent witness; but doubtless the legislature, with a restorative purpose in mind, meant that a person convicted of any offense which theretofore had removed his civil rights could still be and become a competent witness, and the only conviction which could deprive a man of his civil rights was conviction of a felony; and hence the statute means, and what the legislature intended was, conviction of any such offense as would deprive one of his civil rights, or a felony. Consequently, it necessarily follows that the last portion of this section means the same thing, namely, the conviction of the felony which deprived the man of his civil rights could be proved either by the record or the testimony of the witness. Section 8907 does not intend to lay down any new rule of evidence, is wholly restorative in character and purpose, and is entirely in consonance with the provisions of section 8024, *supra*, which lays down the rule for impeachment, and it neither adds to, nor detracts from, nor modifies the rule for

impeachment enunciated in section 8024. The court properly excluded the evidence of the conviction of the witness of a misdemeanor.

Respondent urges misconduct of the jury as ground for a [2] new trial, and the record contains affidavits of some of the jurymen which indicate prejudice against the defendant by which he was denied a fair trial; also the affidavits of third persons tending to substantiate the same contention. The principal third party affidavits are made by detectives from the Burns Detective Agency, and assume to detail statements made by certain of the jurymen after the trial. A portion of the affidavit of E. A. Cooper, Burns detective, is quoted as follows, and is a fair statement, as showing the nature of the substance of the affidavits pertaining to statements of other jurymen: "That the said F. L. Champ then stated that he did not know Stein personally, and had never had any business dealings with him, but that he had heard that Mr. Stein was in the habit of charging an exorbitant rate of interest on money loaned, and that about a year ago a friend of his, a railroad man, had borrowed eight dollars from Stein on the first of the month leaving his watch as security, and that on the twentieth of the month, when he went to redeem it, he was charged two dollars interest, making a total of ten dollars, and that ever since then, he, Mr. Champ, had had no use for Mr. Stein, and that, further, he had always hated a Jew; that he was one of the jurors that recently convicted Stein on a bootlegging charge here, and that he wanted the court to allow the jury to impose sentence giving Mr. Stein the extreme penalty of the law; that Charles Marsant, the state's witness in the case, was nothing but a drunken sot, unworthy of belief, but that in his opinion Stein was guilty of the charge, and that he hoped he would get the limit of the law.

"That affiant then stated to the said Champ, 'It is a fact then that for the past year, or ever since your friend was charged two dollars interest on that eight dollar loan on his watch by Mr. Stein, you have never had any use for Stein,'

and that Champ then replied, 'I have never had any use for Stein since, and I will help you all I can to get him,' and that the said Champ further stated that, if he could find any railroad men who had borrowed money from Stein, he would get their names for affiant."

D. F. Simmons, also a Burns detective, makes affidavit in corroboration of Cooper.

This court has said the object to be attained is controlling in [3] determining the character of pleadings, motions and other papers filed in an action (*Currey* v. *Butte Elec. Ry. Co.*, *ante*, p. 146, 199 Pac. 243), and, where the object sought to be attained is the impeachment of their verdict, jurymen will not be heard to assail the integrity of their own verdict by affidavit or otherwise (*Currey* v. *Butte Elec. Ry. Co.*, *supra*). What a juror cannot do directly he is not permitted to do indirectly. Referring to a similar condition, in which the affidavit of a third person setting forth statements made by a juror after the trial was before the supreme court of California, that court said: "This affidavit was properly refused admission in evidence. While it is not in terms an affidavit by a juror impeaching his own verdict, it is an affidavit of admissions made by a juror to the same effect. If the juror himself would not have been permitted to make affidavit directly to these facts, clearly the affidavit by another of his declarations and admissions, offered for the same purpose, would be equally inadmissible. What the juror could not do directly could not thus indirectly be effectuated. However the rule may be in other states, it is settled in this beyond controversy that a juror may impeach his own verdict upon no other ground than that designated by the Code." (*Siemsen* v. *Oakland etc.*, 134 Cal. 494, 66 Pac. 672.) This statement of the rule meets with our approval, and hence the lower court was not justified in granting the new trial upon the ground of misconduct of the jury.

Respondent further undertakes to assert his right to a new [4] trial upon the ground of newly discovered evidence, but

his position is untenable. All of the proposed newly discovered evidence is impeaching in its character, and cumulative. The defendant produced upon the trial witnesses to impeach the state's witness, Marsant, and all of the evidence claimed as newly discovered, if produced, could have no other possible effect than to put in question further the integrity of Marsant, and to that extent would be cumulative. Again, however, this court has held that newly discovered evidence which is only for the purpose of impeachment is not sufficient, as a general rule, to warrant the granting of a new trial. (*State* v. *Belland*, 59 Mont. 540, 197 Pac. 841; *State* v. *Matkins*, 45 Mont. 58, 121 Pac. 881.) Assuming that the respondent could produce upon another trial all of his proposed newly discovered evidence, it could tend to but affect further the credibility of the state's witness Marsant and state's witness Jarman, and is therefore insufficient as a basis for a new trial. We think the lower court was in error in granting the new trial upon this ground.

We have examined the entire record herein with a view of [5] determining whether the action of the trial court could be sustained upon any ground, and are unable to find any theory upon which it can be justified. This court is always more reluctant to set aside the order of the court below in granting a new trial than in refusing the same (*Gibson* v. *Morris State Bank*, 49 Mont. 60–71, 140 Pac. 76), and yet when the motion is based entirely upon documentary evidence, as in this case, the ultimate fact as to whether or not a new trial should be granted must be determined by the court below from the dead printed record before it, under the same principle as this court reviews the case on appeal, and the fact that he may have observed the demeanor of the witnesses upon the stand is of no assistance to it in determining the merits of the motion; and upon the same principle this court will determine the propriety of the action of the lower court, and upon the same record which was before the court below.

We are unable to find substantial merit in any of the contentions of the respondent, nor does the record disclose any ground upon which the order of the court below can be sustained. We therefore recommend that the order of the trial court in granting the motion for a new trial be reversed, and the cause remanded to the district court of Custer county, with directions to enforce judgment upon the verdict of conviction.

PER CURIAM: For the reasons given in the foregoing opinion, it is ordered that the order of the lower court granting a new trial be reversed, and the cause remanded to the district court of Custer county, with directions to enforce judgment upon the verdict of conviction.

Rehearing denied September 26, 1921.

CITY OF MILES CITY, APPELLANT, v. DRUM, RESPONDENT.

(No. 4,399.)

(Submitted June 6, 1921. Decided June 27, 1921.)

[199 Pac. 719.]

Cities and Towns—Police Courts—Ordinances—Criminal Prosecutions—Right of Appeal.

Appeal Lies Only When Granted by Statute.

1. An appeal lies only when authorized by statute.

Cities and Towns—Police Courts—Criminal Prosecutions Under Ordinances—Appeal.

2. Defendant, charged with wrongfully obstructing an alley, was proceeded against under the statute governing criminal procedure in police courts (Rev. Codes, secs. 9584–9629), convicted and appealed to the district court, where the complaint was dismissed. *Held*, on appeal by the city that, the statute not granting the right of appeal to cities in criminal causes tried in justice or police courts, the appeal did not lie.

Appeal from District Court, Custer County; Daniel L. O'Hern, Judge.

[60 Mont. 451.]

J. G. DRUM was convicted in the police court of violating an ordinance of Miles City, and appealed to the district court, where the complaint was dismissed. The city appeals. Dismissed.

Cause submitted on briefs of Counsel.

Mr. S. D. McKinnon, for Appellant.

Mr. P. F. Leonard, for Respondent.

MR. COMMISSIONER SPENCER prepared the opinion for the court.

By a complaint filed in the police court of the city of Miles City, Montana, the defendant was charged with "unlawfully, wrongfully, willfully, and unnecessarily" obstructing a certain alley in Miles City, in violation of the provisions of a certain ordinance "concerning nuisances." Defendant was arrested upon a warrant issued upon said complaint, tried and convicted in the police court, and a fine imposed. Defendant appealed to the district court of Custer county. At the trial in the district court, plaintiff, city of Miles City, offered in evidence the ordinance "concerning nuisances" above referred to, which was excluded by the court upon the ground that the same was invalid, whereupon, the plaintiff declining to proceed further with the trial, upon motion of defendant, the court dismissed the complaint, and ordered the defendant discharged. Judgment was made and entered accordingly. The plaintiff city of Miles City has attempted to appeal from the judgment. Defendant has made motion to dismiss the appeal for lack of jurisdiction in this court.

[1, 2] The proceedings in civil actions, in police courts, are governed by the provisions of sections 7092 to 7095, Revised Codes. (Sec. 3302, Rev. Codes.) In criminal actions the provisions of sections 9584 to 9629, Revised Codes, are controlling. (Sec. 3301, Rev. Codes.) In this case appellant made no effort, nor did it pretend, to proceed under the stat-

ute, as in a civil action, and hence neither the police court nor the district court acquired jurisdiction for the trial of the action as provided for in sections 7092 to 7095, Revised Codes, *supra*. On the contrary, defendant was proceeded against as in a criminal action, and under the provisions of the statute governing criminal trials set forth above. The defendant prevailed, and the statute grants no right of appeal to the city, plaintiff below. An appeal lies only when authorized by statute. (*In re Searles*, 46 Mont. 322, 127 Pac. 902.) In view of the foregoing the city of Miles City, plaintiff below, was without right of appeal, and we therefore recommend that the appeal herein be dismissed for want of jurisdiction.

PER CURIAM: For the reasons given in the foregoing opinion, the appeal is dismissed for want of jurisdiction.

Dismissed.

BOYLE, APPELLANT, *v.* CHICAGO, MILWAUKEE & ST. PAUL RY. CO., RESPONDENT.

(No. 4,406.)

(Submitted June 7, 1921. Decided June 27, 1921.)

[199 Pac. 283.]

Personal Injuries—Complaint — Insufficiency — Amendment — Proper Denial.

Personal Injuries—Complaint—Insufficiency.

1. Complaint, in an action by a railway employee for injuries caused by the breaking of a lever used in the operation of semaphores, which, while averring that for a long time the lever had been cracked, defective and dangerous, that defendant negligently and carelessly permitted it to remain in such condition for a long period of time, and knew of such condition of the lever, or by the exercise of reasonable care and caution should have known thereof, *etc.*, failed to specify the time during which defendant had knowledge, or opportunity to know, of the defect in the lever, *held* fatally defective.

Same—Complaint—Sufficiency—How Tested—Exception Saved for All Purposes.

2. The sufficiency of the complaint may be tested by demurrer and objection to the introduction of any evidence under it, and exceptions once saved to adverse rulings thereon are saved for all purposes.

[60 Mont. 453.]

Same—Complaint—Insufficiency—Amendment—Proper Denial.

3. Where the attention of plaintiff in a personal injury action had been called to a fatal defect in her complaint by general demurrer, which was overruled, and by objection, at the commencement of the trial, to the introduction of any testimony on the ground of the insufficiency of the pleading to state a cause of action, also overruled, thus affording her ample opportunity to correct the defect, refusal to permit amendment at the close of all the testimony and after defendant had moved for a directed verdict on the same ground among others, was not an abuse of discretion.

Appeal from District Court, Missoula County; Asa L. Duncan, Judge.

ACTION by Catherine Boyle against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for defendant. From an order denying her a new trial, plaintiff appeals. Affirmed.

Mr. Harry H. Parsons and *Mr. Edward Horsky*, for Appellant, submitted a brief; *Mr. Horsky* argued the cause orally.

Until the motion for directed verdict, no argument had ever been made on the insufficiency of the complaint in support of the general demurrer, the general objection to the introduction of evidence, or the motion for nonsuit; and upon the argument in support of the directed verdict, for the first time the court's attention and that of opposing counsel was called to the case of *McEnaney* v. *Butte*, 43 Mont. 526, 117 Pac. 893, whereupon the court held that the complaint was insufficient in the averment "that said lever at said times, and for a long time prior thereto, was cracked, defective, weak and dangerous." Immediately after defendant's counsel presented his argument on the motion, appellant's counsel asked leave to amend to conform to the proof, which the court denied, and granted the motion for directed verdict. The court should have allowed the amendment to be made. (*Harrison* v. *Russell & Co.*, 17 Idaho, 196, 105 Pac. 48; *Merrill* v. *Miller*, 28 Mont. 134, at 145, 72 Pac. 423.) It is proper for the court to permit an amendment to the complaint after denial of a motion for nonsuit on plaintiff's evidence and before judgment, when no

hardship or surprise to defendant was shown and where no change of the issue resulted. (*Merrill* v. *Miller*, 28 Mont. 137, 72 Pac. 423.) The court will sanction the allowance of amendments with great liberality where they do not change the nature of the cause of action or mislead the adverse party to his prejudice. This is so even after the entry of judgment. (*Leggatt* v. *Palmer*, 39 Mont. 302, 102 Pac. 327.)

Cases holding that it was an abuse of discretion in the absence of any claim of surprise, or change of issues, and no specific objection to the introduction of the particular evidence to which it was sought to amend the complaint to conform to the proof, are: *Stevens* v. *Vermillion*, 102 Kan. 408, 170 Pac. 807; *Holler* v. *Aamodt*, 31 N. D. 11, 153 N. W. 465, 467; *Leaman* v. *Thompson*, 43 Wash. 579, 86 Pac. 926, 928; *Cullen* v. *Battle Island Paper Co.*, 124 App. Div. 113, 108 N. Y. Supp. 921; *Morrison* v. *Payton* (Ky.), 104 S. W. 685; *Binion* v. *Lyle*, 28 Okl. 430, 114 Pac. 618; *Doolittle* v. *McConnell*, 178 Cal. 697, 174 Pac. 305; *French* v. *State Farmers' Mut. Hail Ins. Co.*, 29 N. D. 426, L. R. A. 1915D, 766, 151 N. W. 7; *Cottong* v. *Zybell*, 179 Iowa, 1184, 162 N. W. 767. Under the circumstances of this case, and where, as here, the trial of the cause has proceeded to its close on the court's own theory and three prior rulings that the complaint was sufficient, the court should have conformed thereto and permitted the amendment in order that justice be done. (*Fisher* v. *Briscoe*, 10 Mont. 124, 25 Pac. 30; *Newell et al.* v. *Meyendorff*, 9 Mont. 254, 18 Am. St. Rep. 738, 8 L. R. A. 440, 32 Pac. 333; *Williams* v. *Hayes et al.*, 68 Wis. 248, 32 N. W. 44; *Territory* v. *Christensen*, 4 Dak. 410, 31 N. W. 847; *Bank of United States* v. *Moss*, 6 How. (U. S.) 31, 12 L. Ed. 331 [see, also, Rose's U. S. Notes]; *Hagan* v. *Lucus*, 10 Pet. 400, 9 L. Ed. 470; *Cameron* v. *M'Roberts*, 3 Wheat. 591, 4 L. Ed. 467; *Wise* v. *Frey*, 9 Neb. 217, 2 N. W. 375.)

Neither of the cases of *McEnaney* v. *City of Butte*, 43 Mont. 526, 117 Pac. 893, nor *Phillips* v. *Butte Jockey Club*, 46 Mont. 338, 42 L. R. A. (n. s.) 1176, 127 Pac. 1011, nor *Martin* v.

Northern Pac. Ry. Co., 51 Mont. 31, 149 Pac. 89, cited by respondent below, are authority for the refusal of the court to permit the amendment of the complaint to conform to the proof, as this court's opinions and transcripts on appeal therein show. No doubt each of said cases holds, as do many others, that a directed verdict may properly be sustained on the ground that the complaint does not state a cause of action, but none of said cases holds that the complaint may not be amended to conform to the proof, which is the particular proposition here involved.

Mr. W. L. Murphy and *Messrs. Gunn, Rasch & Hall*, for Respondent, submitted a brief; *Mr. Carl Rasch* argued the cause orally.

That the complaint failed to state a cause of action under the law of *McEnaney* v. *City of Butte*, 43 Mont. 526, 117 Pac. 893, and *Phillips* v. *Butte Jockey Club*, 46 Mont. 338, 42 L. R. A. (n. s.) 1076, 127 Pac. 1011, is conceded. Had there been evidence to warrant the submission of the case upon the complaint amended as proposed, the amendment could not then have been allowed, as all the plaintiff's proof went in over the defendant's objection challenging the sufficiency of the complaint. That challenge was made and maintained at every stage throughout from the beginning to the end. It was made by demurrer, by objection to the introduction of any evidence, by motion for nonsuit, and by motion for a directed verdict, and it was stated and expressed in terms prescribed and authorized by the statute itself, to-wit: "In the language of the statute." (Rev. Codes, sec. 6535.) As in *Phillips* v. *Butte Jockey Club, supra*, and in *Ferrat* v. *Adamson*, 53 Mont. 172, 163 Pac. 112, so here, the objection was "saved for all purposes," and one of the purposes which it serves is to preclude an amendment of the pleading in the face of the objection. (*Audley* v. *Townsend*, 126 App. Div. 431, 110 N. Y. Supp. 575; *Guerin* v. *St. Paul etc. Ins. Co.*, 44 Minn. 20, 46 N. W. 138; *Maclaren* v. *Kramar*, 26 N. D. 244, 50 L. R. A.

(n. s.) 714, 144 N. W. 85; *Northwestern Thresher Co.* v. *McNinch*, 42 Okl. 155, 140 Pac. 1170; *United States* v. *Mullen Fuel Co.*, 118 Fed. 663.)

MR. COMMISSIONER JACKSON prepared the opinion of the court.

Appeal from an order denying a new trial. This action was for damages on account of personal injuries alleged to have been sustained by plaintiff while an employee of the defendant. In the course of her employment, it was her duty to move certain levers which governed the action of semaphores on the railroad line, and while moving one of them she alleged that by defendant's negligence it broke, and she was thrown to the floor, sustaining the alleged injuries.

Among other allegations, the complaint states: "That said [1] lever at said times, and for a long time prior thereto, was cracked, defective, weak, and dangerous; that defendant had negligently and carelessly neglected and omitted to responsibly inspect the condition of the same; that a reasonable inspection would have disclosed the said condition of the same; that defendant likewise negligently and carelessly failed and omitted to warn or give notice to plaintiff of its said condition, and likewise negligently and carelessly allowed and permitted the same to remain in said condition for a long period of time prior to the actual breaking thereof; that defendant knew of the said condition of said lever, or by the exercise of reasonable care and caution on its part would have known thereof, but that same was wholly unknown to and unsuspected by this plaintiff, and by the exercise of due care on her part could not have become known to or discovered by her."

A general demurrer was overruled. At the trial, before any testimony was given, defendant objected to the introduction of any evidence, basing its objection on the insufficiency of the complaint. The objection was overruled. Defendant's motion for a nonsuit on the ground that the complaint did not state facts sufficient to constitute a cause of action, and on the fur-

ther ground that the evidence did not show, nor tend to show, negligence on its part, was denied, and its motion for a directed verdict on the same grounds at the close of all of the testimony was granted. Judgment was entered for defendant on the verdict. Before the court had ruled on the latter motion, plaintiff sought leave to amend the complaint by making definite the time during which defendant knew, or should have known, of the defective mechanism. The motion was denied. Since the action of the court in this case in denying the motion for a new trial must be affirmed on the insufficiency of the complaint, it is not necessary to consider the evidence.

Under the settled law of this state the complaint is fatally defective, in that the time alleged during which defendant's knowledge of the defect in the lever, or opportunity to know, is not definite, and does not come within the requirements of section 6532, Revised Codes. "The allegation is but a conclusion which the pleader has left unaided by the statement of any specific fact to enable one to determine what the length of time was." (*McEnaney* v. *City of Butte*, 43 Mont. 526, 117 Pac. 893.) In fact, as to the sufficiency of the complaint, it seems conceded by plaintiff that it is defective, as all of the arguments and citations in the brief are addressed to the court's action in denying the application to amend.

The defendant protected its position by demurrer and ob-
[2] jection to the introduction of any evidence under the complaint, in compliance with section 6535, Revised Codes, and as has been well stated in *Ecclesine* v. *Great Northern Ry. Co.*, 58 Mont. 470, 194 Pac. 143, citing *Ferrat* v. *Adamson*, 53 Mont. 172, 163 Pac. 112: "The sufficiency of the complaint may be tested by demurrer or by objection to the introduction of evidence. In either event, the adverse ruling is excepted to, and the exception, once saved, is saved for all purposes."

Had the evidence been received without objection, unques-
[3] tionably it would have been the duty of the court to permit the amendment. But since all of plaintiff's testimony was admitted over defendant's objection, its exception to the court's

ruling placed defendant in such a position that, so far as it was concerned, under a fatally defective complaint, the evidence introduced cannot be considered.

No human agency is infallible, and if the trial judge had mistakenly overruled the demurrer and the objection to the introduction of any testimony, and had likewise denied the motion for a nonsuit, he was not bound thereby to continue his mistake and deny the motion for a directed verdict, when the error of his previous rulings became apparent.

If plaintiff had been permitted to amend, and the record does not show the amendment was offered to conform to all or any of the proof, what could be the sense or good judgment in the position of the defendant in establishing a right by demurrer or objection? It would be simply a work of supererogation.

The cases cited by plaintiff are not to the point in the instant case, and go mainly toward the discretionary power of the trial court to permit amendments in the furtherance of substantial justice. Has plaintiff been denied a substantial right in this case? We think not. She entered the courts on nothing, namely, a defective complaint. The defect was pointed out by demurrer and objection, and she had ample opportunity to correct it. Since she did not do so, and since the defendant stood on the right that its attitude during the litigation gave it, plaintiff cannot complain. The court did not abuse its discretion in denying the application to amend.

All the well-settled law of the land is in accord with defendant's position in matters that parallel this action.

"A motion, after the close of the evidence, to conform the pleadings to the proof, can never be granted where the admission of the evidence was properly objected to when it was offered." (*North Western Thresher Co.* v. *McNinch*, 42 Okl. 158, 140 Pac. 1170, and cases there cited.)

"The right to amend a pleading so as to make it conform to the proof proceeds upon the theory that it presented the issues sought to be established by the evidence introduced and

admitted without objection, but that some material allegation had been inadvertently omitted therefrom. In such cases it is the duty of the court, after the evidence upon the supposed issue has been introduced without objection, to permit the amendment; but, when objection has been made to its introduction, the court has no authority to allow such amendment, as this would have a tendency to invert the orderly mode of trial prescribed by statute, and lead to the practice of settling issues after, instead of before, trial, thereby returning to primitive methods. The plaintiff having made objection to the introduction of this evidence, there was no abuse of discretion in denying leave to the defendant to file its amended answer." (*Mendenhall* v. *Harrisburg Water Power Co.*, 27 Or. 38, 39 Pac. 399.)

For the reasons stated, we recommend that the order appealed from be affirmed.

PER CURIAM: For the reasons given in the foregoing opinion, it is ordered that the order appealed from be affirmed.

Affirmed.

O'NEIL ET AL., RESPONDENTS, *v.* CHRISTIAN ET AL., APPELLANTS.

(No. 4,402.)

(Submitted June 6, 1921. Decided June 27, 1921.)

[199 Pac. 706.]

Negligence—Machinery—Proximate Cause of Injury—Complaint—Insufficiency—Measure of Defendant's Duty—Erroneous Instruction—Evidence—Cross-examination.

Negligence—Proximate Cause of Injury—Complaint must Allege—Exception to Rule.

1. Since negligence does not give rise to a cause of action unless it was the proximate cause of injury, the complaint must disclose the causal connection between the acts of negligence alleged and the injury suffered, unless such connection is necessarily inferred from the facts stated, in which event a specific allegation to that effect may be dispensed with.

[60 Mont. 460.]

Same—Causal Connection Between Negligence and Injury—Complaint—Insufficiency.

2. Complaint in an action to recover damages for grain burned in the stack due to alleged negligence in the person doing the threshing, *held* insufficient to show a causal connection between the negligence and the burning; *held*, further, that the contention that from the allegations that the threshing-engine had been placed to the windward of the stacks of grain, that the smokestack thereon was old and worn, that, if a spark-arrester was used, it was in the same condition and full of holes, that coal of inferior quality was used by defendant, that the engine was in charge of an unlicensed and incompetent engineer, *etc.*, it was a necessary inference that fire was emitted from the engine and communicated to the grain stacks, and that for that reason a direct allegation as to causal connection was not required, under the above rule, is untenable.

Same—Exoneration—Cross-examination—Improper Exclusion.

3. Plaintiff having testified that the threshing-machine engine, sparks from which were alleged to have set his grain stacks on fire, had been placed to the windward of the stacks by defendant, refusal to permit the latter to testify on cross-examination that the engine had been placed where it was by direction of plaintiff over defendant's objection that it was dangerous, was error.

Same—Condition of Machinery—Ordinary Care—Erroneous Instruction.

4. Since the measure of defendant's duty was to exercise only ordinary care to provide a threshing-machine engine in a reasonably safe condition and to exercise the same care to maintain it in that condition, it was gross error to instruct the jury that an engine in a reasonably safe condition means one which combines the greatest safety with practical use, inasmuch as only an engine mechanically perfect could meet such requirement.

Appeal from District Court, Hill County; W. B. Rhoades, Judge.

ACTION by Michael O'Neil and another against T. L. Christian and another. Judgment for plaintiffs, and defendants appeal from an order denying them a new trial. Reversed.

Mr. D. L. Blackstone and *Messrs. Norris & Hurd,* for Appellants, submitted a brief; *Mr. Edwin L. Norris* argued the cause orally.

Mr. A. F. Lamey and *Mr. L. V. Beaulieu,* for Respondents, submitted a brief; *Mr. Lamey* argued the cause orally.

To state a cause of action for damages resulting from negligence, it is necessary that the complaint disclose the duty, the breach and the resulting damages. (*Fusselman* v. *Yellowstone Valley L. & I. Co.,* 53 Mont. 254, Ann. Cas. 1918B, 420, 163

Pac. 473.) The complaint informed the appellants in a concise and terse manner as to what they would be required to meet, and we contend that it stated a good cause of action for damages in negligence. (*Pullen* v. *City of Butte*, 38 Mont. 194, 21 L. R. A. (n. s.) 42, 99 Pac. 290; *Forquer* v. *North*, 42 Mont. 272, 112 Pac. 439; *Hoskins* v. *Northern Pacific Ry. Co.*, 39 Mont. 394, 102 Pac. 988.) If we had gone further in our complaint and alleged in detail the kind of spark-arrester which we thought should have been used, the size of the engine, the kind of smokestack and so forth, we would have pleaded evidence and conclusions. In short, it would have been surplusage.

We are mindful of the rule in this state which permits negligence to be charged in general terms, but we submit that it is a rule of permission and not of compulsion. To the objection that there is no allegation of causal connection between the alleged negligence of the appellants and the happening of the fire, we contend that in paragraph 8 of the complaint there is a direct allegation to the effect that the omissions of the plaintiffs caused the fire and damage, and we further contend that no specific allegations are necessary, since from the facts stated in the complaint the causal connection must necessarily be inferred. (*Allen* v. *Bear Creek Coal Co.*, 43 Mont. 269, 115 Pac. 673.)

In the face of the testimony of witness O'Neil to the effect that he did not tell the operator of the engine where he wanted it spotted, the appellants made offer to prove by the witness on cross-examination that it was under the instruction of O'Neil that the engine was spotted and placed where it was. That at the time the engine was so spotted and placed where it was, one of the appellants, Harry Christian, informed O'Neil that under the conditions it was very dangerous to thresh the grain from where the engine was spotted; that witness O'Neil insisted on having the engine remain where it was and said that he would assume all liability for any fire. Plainly and obviously this was an attempt to prove by cross-examination

of respondents' witness O'Neil the affirmative defense of contributory negligence. That this practice is not permitted in this state is beyond question. (*Davis* v. *Morgan*, 19 Mont. 141, 47 Pac. 793; *Borden* v. *Lynch*, 34 Mont. 503, 87 Pac. 609; *Shandy* v. *McDonald*, 38 Mont. 393, 100 Pac. 203.)

Assuming that the court erred in refusing the offer, we contend that the error was harmless in that it has been held that the fact that the engine was placed in a position suggested by the owner of the grain, although dangerous, does not necessarily show carelessness on the part of the owner of the grain. (*Richardson* v. *Douglas*, 100 Iowa, 239, 69 N. W. 530.)

With reference to the instruction relating to defendants' liability, we do not find any decision in this state directly in point, but in 1 Thompson on Negligence, 741, the rule with reference to the requirements of an operator of a steam-threshing outfit is stated as follows: "It has been well reasoned that an owner of a steam-threshing machine is bound to use reasonable means and efforts and furnish good and well-constructed machinery and a proper spark-arrester, combining the greatest safety with practical use." The purpose of this instruction was to inform the jury that it was not incumbent upon the respondents to inspect the defendants' engine when it was brought upon their premises and that respondents had a right to assume that the engine was in a certain condition of repair. Appellants complain that this instruction required that the engine be in the condition of "greatest safety." A reasonable construction of the instruction does not warrant appellants' conclusion, for the words "greatest safety" are modified by the further words, "to exercise reasonable means and efforts to have the engine in reasonably safe condition, combining the greatest safety with practical use."

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought to recover damages for the destruction of personal property. In the complaint it is alleged that

plaintiffs owned certain stacks of grain ready to be threshed, and that defendants owned a steam threshing outfit and were employed to thresh for plaintiffs; that at the time the threshing-machine was brought upon plaintiffs' premises a strong wind was blowing from the southwest; that defendants placed the engine in a southwesterly direction from the separator and grain stacks; that the engine was in charge of an unlicensed and incompetent engineer; that an inferior quality of coal was used in the engine by the defendants; that the engine was of insufficient capacity properly to operate the separator; that the smokestack of the engine was old, worn and perforated with large holes, and, if a spark-arrester was used, it, too, was old, worn and full of holes, and of an inferior grade and design; that all of these facts were known to the defendants, or in the exercise of ordinary care should have been known to them; that sparks, lighted embers, and burning coals were emitted from the engine and carried on to the stacks of grain, igniting and burning six of them, of the value of $1,500. Paragraph 8 of the complaint reads as follows: "That the said fire and damage was due to the failure of the defendants to provide a proper and ample steam-engine to propel the said separator with ease and normal pull, and the failure of the said defendants to carefully and properly equip, inspect, and operate, and cause the said engine to be equipped, inspected, and operated in a careful, proper, and prudent manner."

The answer denies any negligence on the part of the defendants, and attempts, but fails, to plead contributory negligence. The trial resulted in a verdict and judgment for plaintiffs, and defendants appealed from an order denying them a new trial.

1. The sufficiency of the complaint was challenged by an objec-
[1] tion to the introduction of any evidence. It is elementary that negligence does not give rise to a cause of action, unless it is the proximate cause of injury. (*Pure Oil Co.* v. *Chicago etc. Ry. Co.*, 56 Mont. 266, 185 Pac. 150), and that, to make out a case, the complaint must disclose, among other

things, the causal connection between the acts of negligence alleged and the injury suffered (*Stones* v. *Chicago etc. Ry. Co.*, 59 Mont. 342, 197 Pac. 252). Counsel for plaintiffs recognize these rules, but insist that they are met by the allegations of paragraph 8 above, or, if not, that plaintiffs bring themselves within the rules, under the interpretation given in *Allen* v. *Bear Creek Coal Co.*, 43 Mont. 269, 115 Pac. 673; that, if the causal connection is necessarily inferred from the facts stated, a specific allegation disclosing the causal connection may be dispensed with. Paragraph 8 is nothing more than a summary of the preceding allegations relating to negligence. It does not add anything to what is theretofore stated, and, if the complaint is not sufficient otherwise, it is not aided by the addition of this paragraph.

We approve the interpretation of the rules first adverted to, as stated in *Allen* v. *Bear Creek Coal Co.*; but a casual reading of the complaint involved in that case will disclose the reason for the conclusion reached by this court that it was sufficient. From the facts therein specifically averred, the inference was compelled that the want of timber in room No. 13 caused the loose rock in the roof to fall upon plaintiff, pro-
[2] ducing the injuries of which complaint was made. But can it be said to be a necessary inference that the fire was emitted from this engine and communicated to the grain stacks, from the fact that the engine was placed in the position which it occupied, or from the fact that the engine was in charge of an unlicensed and incompetent engineer, or from the fact that an inferior quality of coal was used, or from the fact that the engine did not have ample power to properly operate the separator, or from the fact that the smokestack and spark-arrester were defective and full of holes, or from all of these facts combined? Clearly not. Just what relationship any one or all of them bore to the ultimate fact that the fire was emitted from the engine and communicated to the grain does not appear. The objection to the introduction of evidence should have been sustained.

2. In his direct examination, plaintiff O'Neil, testifying in [3] behalf of the plaintiffs, stated that defendant Harry Christian located the engine with reference to the separator and grain stacks. On cross-examination he was asked: "Who caused the engine and separator to be set where they were when the grain was first threshed on your place?" An objection by counsel for plaintiffs was sustained, and defendants thereupon made an offer to prove by the witness that the engine was placed in the position which it occupied by direction of plaintiff O'Neil over the protest and objection of defendant Harry Christian that it was dangerous, on account of the fact that the wind was blowing in the direction from the engine to the grain stacks, and that O'Neil then stated that he would assume all the risk of sparks or fire being blown upon the grain stacks. The offer was refused, and error is predicated upon the ruling. We are unable to understand the theory upon which the trial court proceeded in excluding this evidence. It was proper cross-examination, and if defendants could prove by the witness the facts incorporated in their offer of proof—and for the purposes of this appeal it must be assumed that they could do so—then it would follow that, so far as the particular charge of negligence based upon the position occupied by the engine is concerned, defendants would have been fully exonerated. It is elementary that no one can complain of the consequences of his own wrongful act. We do not hold that it was necessary for defendants to make an offer of proof under the circumstances; but, having made it and thereby disclosed the relevancy and materiality of the evidence sought to be adduced, it was error for the court to exclude it.

3. Over the objection of defendants, the trial court gave [4] instruction No. 10, as follows: "The court further instructs you that it was not incumbent upon the plaintiffs to inspect the defendants' engine when it was brought upon their premises, and that plaintiffs had a right to assume that defendants had exercised reasonable means and efforts to have

the engine in a reasonably safe condition, combining the greatest safety with practical use."

The vice of the instruction consists in the addition of the last clause. The measure of defendants' duty was to exercise ordinary care to provide an engine in a reasonably safe condition and to exercise ordinary care to maintain it in that condition. (29 Cyc. 462.) But it was gross error to instruct the jury that an engine in a reasonably safe condition means one which combines the greatest safety with practical use. Only a machine mechanically perfect could meet this requirement. The giving of this instruction was tantamount to directing a verdict for the plaintiffs. It took from the jury all questions of negligence, and left for determination only the question of damages.

We do not find any merit in the other assignments. For the reasons stated, the order is reversed and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, COOPER and GALEN concur.

HOGSED, APPELLANT, *v.* GILLETT, EXECUTOR, ET AL., RESPONDENTS.

(No. 4,391.)

(Submitted June 6, 1921. Decided June 27, 1921.)]

[199 Pac. 907.]

Real Property—Contract of Sale—Cancellation of Instruments—Rescission—Tender—Insufficiency.

Real Property—Deed—What Does not Constitute.

1. A deed claimed to have been tendered by plaintiff vendor, in an action for the cancellation of a contract for the conveyance of land, to the vendees in which no grantor was named and which named the vendor and his wife as grantees and was executed by themselves, was not entitled to any consideration as a deed.

[60 Mont. 467.]

Same—Contract of Sale—Time—Tender of Deed—When too Late.

2. Where time was made of the essence of a contract of sale of land and the vendees under its terms could at any time tender final payment and demand a deed on or before a certain date, and did so but the vendor failed to comply, a tender made at the trial which was long after the time within which it should have been executed, came too late to deprive the vendees of the right to rescind.

Same—Imperfect Title—Rescission.

3. Under the rule that rescission lies for any breach of contract of so material and substantial a nature as would constitute a defense to an action brought by the party in default for a refusal to proceed with the contract, *held*, that where vendor could not give vendees a deed conveying a good title at any time prior to the date mentioned in a contract of sale because he had no title to convey, rescission in favor of vendees was properly decreed.

Same—Good Title—Vendor must be Able to Convey at Time Fixed in Contract.

4. While a vendor is not required to have a perfect title at the time he enters into a contract to sell the land or at all times between the date of the contract and the time conveyance is to be made, he must have title at the time of performance; otherwise rescission may be decreed.

Appeals from District Court, Yellowstone County; Charles A. Taylor, Judge.

ACTION by W. R. Hogsed against Frank H. Gillett, as executor of the estate of Joseph Spragg, deceased, and another. Judgment for defendants, and plaintiff appeals from it and from the order overruling his motion for a new trial. Affirmed.

Cause submitted on brief of Appellant.

Messrs. Grimstad & Brown, for Appellant.

Plaintiff submits that the tender on the part of the defendants was not good, for the reason that it was made before the last date upon which plaintiff could demand payment of the money due under the contract, and for the further reason that the offer to pay should have been made at the Belgrade State Bank, Belgrade, Montana, where the notes were payable, and for the further reason that there should have been

---

3. On right to rescind or abandon contract because of other party's default, see notes in 3 Ann. Cas. 366; 30 L. R. A. 64.

an actual tender of the money, either to the plaintiff himself or his authorized agents, or at the place where payment should have been made. None of these things were complied with by the defendants, and therefore their tender, under the law, was insufficient in order to rescind the contract. (*McCauley* v. *Leavitt*, 10 Utah, 91, 37 Pac. 164; 38 Cyc. 150, sec. 2; *Hanson* v. *Fox*, 155 Cal. 106, 132 Am. St. Rep. 72, 20 L. R. A. (n. s.) 338, 99 Pac. 489; Rev Codes, 1907, sec. 8036.)

The defendants could not rescind upon the ground that the plaintiff did not have title to the property, as under the law it makes no difference whether or not, at the time of entering into a contract of sale, the vendor has legal title to the same. The plaintiff in this action had the right to cancel the contract because of failure to make the payments due under the contract, and he could make this cancellation even though he did not have title to the property. (*Hanson* v. *Fox, supra; Joyce* v. *Shafer*, 97 Cal. 335, 32 Pac. 320; *Thomas* v. *McCue*, 19 Wash. 287, 53 Pac. 161.)

In *Allstead* v. *Nicol*, 123 Cal. 594, 56 Pac. 452, the following principle of law was laid down: "The rule has gone so far in some cases as to hold that if the vendor is able to procure and give a good title at the time of the decree, even though he could not do so at the commencement of the suit, the doctrine of the equity court will be satisfied." To the same effect is the case of *Kimball* v. *West*, 82 U. S. 377, 21 L. Ed. 96 [see, also, Rose's U. S. Notes].

MR. CHIEF COMMISSIONER POORMAN prepared the opinion for the court.

Appeals by plaintiff from a judgment entered in favor of defendants, and from the order of the court overruling the plaintiff's motion for a new trial. The cause was tried by the court, sitting without a jury.

The plaintiff asked for cancellation of a contract for the conveyance of land, and for a decree to the effect that defendants have no right, title, interest or estate in the lands,

and that they be forever enjoined from claiming any interest therein. The answer admits and denies certain allegations of the complaint; alleges violation of the contract on the part of the plaintiff, and that defendants had made certain payments; and they ask for judgment that the plaintiff return to defendants the property conveyed to plaintiff as part payment, and the money which they had paid and that the contract be rescinded. The facts appearing from the record are:

By agreement dated March 4, 1912, the plaintiff and Grace E. Hogsed agreed to convey to defendants by warranty deed, free and clear of any encumbrance, and defendants agreed to purchase of plaintiff certain lands in Yellowstone county, Montana, the consideration being $8,280. The defendants were to convey to plaintiff two certain lots in the town of Belgrade, which were to be accepted as part payment, in the sum of $5,880, the remaining purchase price to be evidenced by notes of defendants, one note for $350, payable October 26, 1914, without interest, one note for $1,000, payable on or before March 1, 1915, with interest at the rate of eight per cent per annum until paid, and one note for the sum of $1,050, payable on or before March 1, 1915, with interest at the rate of eight per cent per annum until paid. Plaintiff agreed that when the payments were made he would execute and deliver to defendants the deed to the lands. It is further provided that "time is the essence of this agreement," and, if defendants failed to comply with the covenants and conditions of the agreement, plaintiff was entitled to terminate the agreement, and defendants forfeited all previous payments made. Defendants were to pay the taxes on the land, and the contract was made to extend to and be binding upon the heirs, administrators, executors and assigns of the parties. The deed to the Belgrade lots and the notes mentioned in the agreement were all executed and delivered to the plaintiff, and defendants entered into possession of the lands. The notes put in evidence do not in all respects correspond with the notes referred to in the contract. All the notes introduced as evidence,

were dated March 1, 1912, and the $350 note, due October 26, 1914, bears interest at the rate of eight per cent, and is made payable on or before October 26, 1914. There is another $350 note introduced in evidence, due on or before March 1, 1915, which is not specifically described in the contract, but probably has reference to the money advanced by the plaintiff to the defendants, which is mentioned in the contract. The notes, however, were executed and accepted, and it is admitted by the plaintiff that defendants paid the principal of one of the $350 notes.

On October 26, 1914, defendants offered to pay the balance of the purchase price, on condition that plaintiff "deliver a good and sufficient conveyance" to the lands. No deed was ever tendered by plaintiff, and on November 3, 1914, plaintiff's attorneys notified defendants in writing that plaintiff was ready and willing to give them a deed as called for in the contract, at any time they made payment of the balance due, and stated that if prompt payment was not made by the defendants suit would be started to cancel the contract; and on December 28, 1914, plaintiff's attorneys again called the attention of Mr. Gillett to the fact that the notes had not been paid. On February 1, 1915, the defendants' attorney called the attention of the plaintiff to the fact that they had on October 26, 1914, offered to make payment on condition that a deed be delivered to them, as described in the contract, and that no deed had ever been delivered or tendered, and that they deemed the time which had elapsed since the said tender wholly unreasonable, and that they then withdrew the tender and rescinded the contract. On June 8, 1915, the plaintiff by his attorneys notified the defendants in writing that, by reason of their default in making the payments, the contract was canceled; that unless they made such payment on or before the 16th of June, 1915, the said contract would be absolutely terminated; and on June 21, 1915, this action was commenced.

Plaintiff testified: "I bought the land from Sears and Dawes. I had a contract with them involving this land in

controversy. This contract is at my home at the present time, and was signed by C. J. Sears and John H. Dawes. I think the contract was dated March 1, 1912." It affirmatively appears from the record that neither C. J. Sears nor John H. Dawes ever had title to the land in question, but that the title thereto was in the government of the United States at all times until March 5, 1915, at which latter date a patent was issued for the lands to Lottie Sears. However, on January 19, 1915, C. J. Sears and Lottie Sears his wife, and John H. Dawes and Mary Dawes, his wife, executed a warranty deed to W. R. Hogsed, and on July 21, 1915, W. R. Hogsed and Grace E. Hogsed, his wife, executed a deed to Frank Koble to the land involved, or a part thereof; and, so far as this record is concerned, Koble is still the owner of this property.

Plaintiff claims that prior to February 1, 1915, he offered [1] to give a deed to defendants, and that the deed so tendered was the only one ever executed by him "regarding this property." This so-called deed, which includes only a part of the land involved herein, was admitted in evidence, and bears date January 21, 1915. No grantor is named in the deed at all, but W. R. Hogsed and Grace E. Hogsed, his wife, are named as parties of the second part therein, and the deed on its face purports to convey land to the parties of the second part, and is executed by W. R. Hogsed and Grace E. Hogsed. In other words, it is an alleged deed by which nobody agrees to convey the lands in question to W. R. Hogsed and his wife, and is signed by W. R. Hogsed and Grace E. Hogsed. This instrument is not entitled to any consideration as a deed.

During the trial of the cause, plaintiff offered to execute [2] a deed to the defendants for the lands in question, but the plaintiff did not at that time own the land, and the time within which the deed should have been executed under the terms of the contract had long since expired. The contract by its terms provides "that when the payments herein provided are met" the plaintiffs will execute and deliver to the defendants a good and sufficient conveyance by warranty deed of

the premises, free and clear of all encumbrance. The deferred payments are evidenced by notes containing the words "on or before." The defendants had the right, under the contract, at any time to tender the final payment and demand the deed to the premises, and time was "the essence of the contract." The plaintiff never did make or tender any deed to the defendants nor could he or anyone, under the facts appearing in this case, have made a deed conveying title "free and clear" at any time prior to March 5, 1915.

Neither the plaintiff nor his attorneys appear to have had [3] any knowledge of the condition of this title. Neither one seemed to know that Lottie Sears ever had any right, title or interest in this land, nor that Sears and Dawes did not have title to it, nor that the plaintiff had conveyed the land to Koble. This conveyance to Koble may have been intended by the plaintiff as a mortgage, but it stands in the record as a deed of absolute conveyance. The law relating to rescission is very succinctly stated by Mr. Williston, wherein, after discussing the general principles, he said: "In truth, rescission is imposed *in invitum* by the law at the option of the injured party, and it should be, and in general is, allowed not only for repudiation or total inability, but also for any breach of contract of so material and substantial a nature as would constitute a defense to an action brought by the party in default for a refusal to proceed with the contract." (3 Williston on Contracts, sec. 1467, at page 2614.)

There is not any dispute of the proposition that one may [4] contract to sell land which he does not own, or that he may sell the land to a third party after he has entered into the contract, but he must be able, when the time of performance arrives, to furnish a good title. In other words, the seller is not required by law to have within himself a perfect title at all times between the date of the contract to convey and the time of conveyance, as required by the contract, but he must have that title at the time of performance, and that is the very thing the plaintiff in this action did not have.

We recommend that the judgment and order appealed from be affirmed.

PER CURIAM: For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

Affirmed.

STATE, RESPONDENT, *v.* SHOWEN, APPELLANT.

(No. 4,758.)

(Submitted June 4, 1921. Decided June 27, 1921.)

[199 Pac. 917.]

Criminal Law—Selling Intoxicating Liquor—Trial—Continuance — Absent Witnesses — Affidavit — Insufficiency — Jury — Selection — Detectives — Evidence — Admissibility.

Criminal Law—Trial—Absent Witnesses—Continuance—Insufficient Affidavit.

1. An affidavit, filed on the day set for trial, in support of a motion for a continuance on the ground of the absence of witnesses, which fails to disclose the date upon which such witnesses left the state, is insufficient.

Same—Trial—Continuance—Affidavit—Contents.

2. An affidavit of the character of the above must disclose specifically the facts expected to be proved by the absent witnesses, and set forth that if such witnesses were present they would testify to those facts; the general statement that, if present, they would testify to facts material to affiant's defense being insufficient.

Same—Trial—Continuance—Cumulative Evidence—Affidavit—Contents.

3. An affidavit of the nature above, must also disclose that the facts which defendant expects to prove by the absent witnesses cannot be proved by other witnesses available at the trial; since a continuance for the purpose of obtaining evidence which would be merely cumulative need not be granted.

Same—Trial—Continuance—Discretion.

4. Granting or refusing a continuance of the trial of a criminal case rests in the sound discretion of the court, and unless the record shows an abuse of discretion, its action will not be interfered with on appeal.

---

2. Avoiding continuance in criminal case by admitting proposed testimony of absent witness, see note in Ann. Cas. 1913C, 488.

[60 Mont. 474.]

Same—Preparation for Trial—Time—Sufficiency.

5. Under section 9237, Revised Codes, the defendant is entitled to at least two days to prepare for trial; therefore where he had seven months from the day of entry of his plea to the day of trial for preparation, he had no cause for complaint in this regard.

Same—Selection of Jury—Recourse to Jury-box No. 3—When proper.

6. In a criminal prosecution, where the regular panel of jurors had been so far depleted that a sufficient number did not remain from which to obtain a jury, and a sufficient number could not be obtained otherwise without great delay and expense, the court did not err in directing a special venire drawn from jury-box No. 3 to complete the jury.

Same—Selection of Jury—When Recourse to Special Venire not Improper.

7. Where the record discloses that defendant did not exhaust his peremptory challenges and that he was accorded a fair trial, the contention that the court erroneously excused members of the regular panel, making recourse to a special venire necessary, is without merit, unless, by rejecting qualified persons, the necessity of accepting others not qualified had been purposely created.

Same—Detectives—Evidence—Admissibility.

8. Testimony of detectives employed by a county to ferret out violations of the prohibition law and to secure evidence upon which to base prosecutions was admissible; the credibility and weight to be given it being matters for consideration by the jury, to whose attention the fact of their employment and the terms thereof had been brought by cross-examination.

Appeal from District Court, Fergus County; Jack Briscoe, Judge.

HARLEY SHOWEN was convicted of selling intoxicating liquors, and appeals from the judgment and an order denying his motion for a new trial. Affirmed.

Cause submitted on briefs of Counsel.

Mr. Charles J. Marshall, for Appellant.

Mr. Wellington D. Rankin, Attorney General, and *Mr. L. A. Foot,* Assistant Attorney General, for Respondent; *Mr. Foot* argued the cause orally.

---

8. Competency and weight of testimony of private detective, see notes in Ann. Cas. 1917A, 589; 67 L. R. A. 923.

[60 Mont. 474.]

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The defendant was convicted of selling intoxicating liquor for beverage purposes, and appealed from the judgment and from an order denying his motion for a new trial.

The information was filed September 3, 1919. On April 14, 1920, the cause was set for trial for April 19. On the latter date the defendant moved for a continuance on the ground of the absence of witnesses, and in his affidavit set forth that his father and mother were then in the state of Missouri; that they "were with affiant all of the time alleged in the information on file herein, and know positively that affiant did not sell any intoxicating liquors at said time to any person whatever." This is the nearest approach to a definite statement of facts to which the absent witnesses would testify, if present. The information charges that the offense was committed on or about the twenty-second day of July, 1919. The evidence offered by the state tended to prove the sale of liquor by defendant occurred just before 12 o'clock midnight on July 21. When the motion for a continuance was presented, the county attorney announced that the state would admit that, if the absent witnesses were present, they "would testify that at the times stated in the information, the twenty-second day of July, 1919, that the defendant did not sell any intoxicating liquors to any person at all." The motion was denied, and error is predicated upon the ruling.

1. The affidavit is altogether insufficient to require the court [1] to postpone the trial. (a) It fails to disclose the date upon which the absent witnesses left the state of Montana. The defendant entered his plea on September 9, 1919. If the witnesses were then absent, the application should have been made at that time. Section 9238, Revised Codes, provides: "At the time the defendant makes his plea to an indictment or information he must notify the court of his desire for a postponement of the trial to some particular day, or for the term, and must file his affidavit, showing good cause therefor,

within such time as the court may grant." Section 9241 provides: "If neither the defendant nor the state notify the court at the time the defendant pleads of a desire for a postponement, they shall not be entitled to make the application thereafter for any cause which existed at that time, and of which the party making the application had knowledge, or could have had knowledge; any application made after that time must be for cause which arose, or had come to the knowledge of the applicant, since the making of the plea." (b) The affidavit [2] does not state specifically any facts to which the absent witnesses would testify. It is not sufficient that the affiant state generally that the witnesses, if present, would testify to facts material to his defense. He must disclose specifically the facts expected to be proved by the absent witnesses, and that if such witnesses were present they would testify to those facts. (16 C. J. 501.) The reason for the rule is obvious. If the specific facts are set forth, the opposing party may avoid the continuance by admitting that the witnesses, if present, would testify to the facts stated in the affidavit. (*Territory* v. *Perkins*, 2 Mont. 467; *Territory* v. *Harding*, 6 Mont. 323, 12 Pac. 750; *State* v. *Gibbs*, 10 Mont. 213, 25 Pac. 289.) (c) The affidavit is insufficient in that it fails to disclose [3] that the facts which defendant expected to prove by the absent witnesses could not be proved by other witnesses available at the trial. (*People* v. *Lang*, 142 Cal. 482, 76 Pac. 232; 16 C. J. 504.)

The defense interposed is in the nature of an *alibi*. In other [4] words, the defendant contends that he was not at his place of business (where the sale is alleged to have been consummated) at or near the time of the alleged sale, as stated in the testimony of the state's witnesses. Apparently the only purpose which could have been served by a continuance would have been to permit the defendant to secure the testimony of his father and mother to the effect that he was at his own home continuously throughout the night of July 21 after 10 o'clock. The defendant, his wife, and two other witnesses,

Fredrickson and Romley, testified substantially to that fact. The evidence sought to be obtained from the absent witnesses would be but cumulative, and for this reason also the court did not err in its ruling. (13 C. J. 154.) Granting or refusing a continuance of the trial of a criminal case rests in the sound discretion of the court, and, since the record fails to show an abuse of discretion in this instance, we are not at liberty to interfere. (*State* v. *Howard*, 30 Mont. 518, 77 Pac. 50.)

Defendant complains also that he was not given ample time [5] to prepare for trial. As observed before, his plea was entered September 9, 1919, more than seven months before the cause was set for trial. We are not disposed to listen with much patience to this complaint. Section 9237, Revised Codes, provides: "After his plea, the defendant is entitled to at least two days to prepare for trial."

2. Exception is taken to the manner in which the jury was [6] selected to try this case. It appears from the record that the regular panel of jurors had been so far depleted that a sufficient number did not remain from which to obtain a jury for the trial of this cause, and that a sufficient number could not be obtained otherwise without great delay and expense. The court thereupon directed a special venire drawn from jury-box No. 3, and from the number summoned and from those remaining of the regular panel the jury was drawn. This complaint likewise is without merit. Section 6357, Revised Codes, provides: "If a sufficient number of trial jurors, duly drawn and notified, do not attend or cannot be obtained in the opinion of the court, without great delay or expense to form a jury, the court may, in its discretion, direct the clerk to draw from box No. 3 in the presence of the court, the names of as many persons as the court deems sufficient for that purpose."

"Trial juries for criminal actions are formed in the same manner as trial juries in civil actions." (Sec. 9234, Rev. Codes; *State* v. *Pippi*, 59 Mont. 116, 195 Pac. 556.) The rec-

[7] ord discloses that the defendant did not exhaust his peremptory challenges and that he was accorded a fair trial. If, as counsel contends, the court erroneously excused members of the regular panel, the record fails to show that defendant was injured thereby. "No party can acquire a vested right to have a particular member of the panel sit upon the trial of his cause until he has been accepted and sworn. It is enough that it appear that his cause has been tried by an impartial jury. It is no ground of exception that, and against his objection, a juror was rejected by the court upon insufficient grounds, unless, through rejecting qualified persons, the necessity of accepting others not qualified has been purposely created." (*State* v. *Rodriguez*, 23 N. M. 156, L. R. A. 1918A, 1016, 167 Pac. 426.)

3. It is true, as counsel contends, that the state's case rests [8] upon the testimony of two detectives employed by the county to ferret out violations of the prohibition law and to secure evidence upon which to base prosecutions. The fact that these witnesses were so employed, as well as the particular terms of their employment, were all laid bare before the jury by the cross-examination conducted by defendant's counsel. The witnesses were not rendered incompetent by reason of their being detectives. Their credibility and the weight to be given to their testimony were matters for consideration by the jury. (40 Cyc. 2654.) If the story told by them is true, the defendant's guilt is established by ample evidence, and the verdict is conclusive of the fact that the jury did believe them.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS and COOPER concur.

MR. JUSTICE GALEN (Concurring Specially): I concur, but in doing so cannot refrain from expressing opinion that evi-

dence by detectives, such as was introduced and relied upon by the state in this case, should be viewed and received with greatest caution and in cases where it appears that the law would not have been violated but for the inducement, encouragement and deception practiced by a decoy, resulting in the entrapment of the accused, such testimony, standing alone, is of questionable sufficiency to warrant a conviction. Each case, however, must be weighed and considered with respect to the facts before the court, and in this case it sufficiently appears from the record that the defendant was in fact engaged in bootlegging.

As applied to the instant case, I fully subscribe to the language used in the case of *Smith* v. *State*, 61 Tex. Crim. 328, 135 S. W. 154, as follows: "This manner of instituting prosecutions against the citizenship of the state and inducing them to commit crime is to be deplored. While it is eminently proper that officers should be diligent in ferreting out crime and violations of the law, yet it does not occur to us that the theory of our law is predicated upon the idea that men should be induced to violate the law in order that a prosecution may be brought about."

As stated in the majority opinion, the widest latitude is, and should be, allowed on cross-examination of such witnesses, and in the case before us was accorded the defendant.

BODE, APPELLANT, v. ROLLWITZ ET AL., RESPONDENTS.

(No. 4,343.)

(Submitted April 14, 1921. Decided July 1, 1921.)

[199 Pac. 688.]

Real Property—Waters and Watercourses—Riparian Lands—Title by Accretion—Public Lands—Adverse Possession—Surveyors—Errors in Survey—Appeal—Theory of Case.

Appeal—Theory of Case.

1. Where an action, commenced as one in ejectment, was tried as one in equity with the assent of both parties, it will be treated as such on appeal, the parties being bound by the theory adopted by them at the trial.

Same—Nonappealable Orders.

2. Appeals do not lie under section 7098, Revised Codes, from orders rejecting findings of the jury, from conclusions of law, or from the action of the court in adopting certain findings of the jury and making findings of its own, the questions thus sought to be raised being reviewable on appeal from the judgment.

Real Property—Streams—"Accreted Lands"—Ownership in Riparian Owner.

3. Under sections 4573 and 4576, Revised Codes, "accreted lands"—that is, additions to the area of real estate from the gradual deposit by water of solid material, whether mud, sand or sediment, producing dry land which before was covered by water, along the banks of a navigable or unnavigable stream—belong to the riparian owner.

Same—Streams—Title by Accretion or Reliction—How Governed.

4. Title to lands acquired by accretion or reliction is governed by the laws of the state where either occurs.

Public Lands—Survey—Waters—Effect of Meander on Rights of Riparian Owner.

5. Where, in the survey of the public domain, a body of water is found to exist and is meandered, the result of such meander is to exclude the area from the survey, and to cause it as thus separated to become subject to riparian rights of the respective owners abutting on the meandered line in accordance with the laws of the several states.

Waters and Watercourses—Sudden Change of Channel—Effect.

6. Where the channel of a river is suddenly and sensibly changed, as by reason of an ice gorge, so that the old channel is abandoned, except in high water, and a new channel formed, no change in

---

4. Alluvion and reliction and the title acquired thereby, see notes in 33 Am. Dec. 276; 35 Am. St. Rep. 307.

[60 Mont. 481.]

the boundary or ownership of land of riparian owners is worked thereby.

Public Lands—Adverse Possession Gives No Title Against Government—Error by Surveyor.

7. Since adverse possession, user or occupancy of public land cannot ripen into a good title as against the government, possession and occupancy of islands which were in existence at the time of the government survey, though not mentioned on the official plat but referred to in the surveyor's field-notes, the surveyor having erroneously failed to extend the survey over them, did not vest title in plaintiff by adverse possession, nor did his error prevent the government from subsequently surveying them and asserting title thereto.

Same—Government Surveyors—Authority.

8. Government surveyors are not invested with authority to determine the character of land surveyed or left unsurveyed, or to classify it as within or without the operation of particular laws.

Same—Land Department—Error by Officers Does not Estop Government.

9. The fact that administrative government officers, before discovery of a surveyor's error in failing to survey islands in a river and including them as part of a meandered tract shown in the river, had treated such a meandered tract as subject to the riparian rights of abutting owners, under state laws, could not estop the United States from asserting its title even as against such an owner who had acquired his property before the mistake was discovered.

Same—Islands—Patent to Land Abutting on River Does not Include.

10. Patents to lots of land abutting on a river do not include actual islands of fast dry land of stable foundation lying between the lots and the thread of the stream.

Same—What Lands Open to Settlement.

11. Under the homestead laws of the United States, unsurveyed public lands, if agricultural and unappropriated, are open to settlement by qualified entrymen, and this applies to land erroneously left unsurveyed and by the surveyor included within the meander lines of a non-navigable river.

Same—Authority of Courts.

12. While the courts have nothing to do with public land surveys, they may determine whether lands have been left unsurveyed and whether a right of possession exists under an inceptive claim.

Appeal from District Court, Yellowstone County; Charles A. Taylor, Judge.

---

7. Adverse possession of public lands, see note in 76 Am. St. Rep. 479.

9. Authorities discussing the question of the title to islands are collated in notes in 58 L. R. A. 673 and 35 L. R. A. (n. s.) 227.

On the right to island attached to shore by accretion, see note in 6 L. R. A. (n. s.) 194.

On the question of title to island by adverse possession, see note in 58 L. R. A. 677.

[60 Mont. 481.]

ACTION by Lydia Belle Bode against Adolph Rollwitz and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Mr. W. L. A. Calder, for Appellant, submitted a brief and one in reply to that of Respondent, and argued the cause orally.

"When an irregular tract or lot of land abuts upon a stream of water, and a meander line is run ostensibly along this shore line for the purpose of fixing the area of such tract, the real boundary of the tract is the shore line and not the meander line." (*Heald* v. *Yumisko et al.*, 7 N. D. 422, 75 N. W. 806; *Johnson* v. *Johnson*, 14 Idaho, 561, 24 L. R. A. (n. s.) 1240, 95 Pac. 499.) The meander line run along or near the margins of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines. The waters themselves constitute the real boundary. (*Hardin* v. *Jordan*, 140 U. S. 371, 35 L. Ed. 428, 11 Sup. Ct. Rep. 808, 838 [see, also, Rose's U. S. Notes]; *Heald* v. *Yumisko*, 7 N. D. 422, 75 N. W. 806; *Johnson* v. *Johnson*, 14 Idaho, 561, 24 L. R. A. (n. s.) 1240, 95 Pac. 499; *Chandos* v. *Mack*, 77 Wis. 573, 120 Am. St. Rep. 139, 10 L. R. A. 207, 46 N. W. 803; *Jones* v. *Soulard*, 24 How. (U. S.) 41, 16 L. Ed. 604.) The riparian owner takes title to the thread of the stream, both in navigable and non-navigable rivers. (*Johnson* v. *Johnson*, 14 Idaho, 561, 24 L. R. A. (n. s.) 1240, 95 Pac. 499; *Kinkaid* v. *Turgeon*, 74 Neb. 573, 21 Am. St. Rep. 740, 13 Ann. Cas. 43, 1 L. R. A. (n. s.) 762, 7 L. R. A. (n. s.) 316, 104 N. W. 1061, 109 N. W. 744; *Goff* v. *Cougle*, 118 Mich. 307, 42 L. R. A. 161, 76 N. W. 489; *Jones* v. *Soulard*, 24 How. (U. S.) 41, 16 L. Ed. 604.) Islands in non-navigable rivers in Montana. (Rev. Codes, secs. 4576, 4577.) "The test is not whether an island appears upon the map but whether it was surveyed as a lot, separate from

the lot on the opposite main shore." (*Schurmier* v. *St. Paul & P. R. Co.*, 10 Minn. 82, 88 Am. Dec. 59; *Railroad Co.* v. *Schurmer*, 7 Wall. 272, 19 L. Ed. 74; Gould on Waters, 140, 141.)

The United States is concluded by the survey according to which the grant is made. Any subsequent survey of the land by the government, made after the grant, is void and without effect as to the grantee. (*Lindsey* v. *Hawes*, 67 U. S. (2 Black) 554, 17 L. Ed. 265 [see, also, Rose's U. S. Notes]; *Schurmier* v. *St. Paul & P. R. Co.*, 10 Minn. 82, 88 Am. Dec. 59; *Railroad Co.* v. *Schurmier*, 7 Wall. 272, 19 L. Ed. 74; *Johnson* v. *Johnson*, 14 Idaho, 561, 24 L. R. A. (n. s.) 1240, 95 Pac. 499; *Jordon* v. *Barrett*, 4 How. (U. S.) 169, 11 L. Ed. 924.) (*Chandos* v. *Mark*, 10 L. R. A. 210; *Horne* v. *Smith*, 159 U. S. 40, 40 L. Ed. 68, 15 Sup. Ct. Rep. 988 [see, also, Rose's U. S. Notes].)

The court found that the change of the current from the north bank to the south was a gradual change through a long term of years. Admitting, then, for argument sake, that this island was present in the river when the survey was made and when the Bodes located upon their homestead, and the current was flowing between the said homestead and the said island, then, if the change of the current was a gradual change through a long term of years, under the weight of authority, this island, or body of land, would belong to the riparian owner. (*Bellefontaine Imp. Co.* v. *Niedringhous*, 181 Ill. 426, 72 Am. St. Rep. 269, 55 N. E. 184; *Willey* v. *Lewis*, 28 Ohio L. J. 104; *Johnson* v. *Johnson*, 14 Idaho, 561, 24 L. R. A. 1240, 95 Pac. 499; *Hatch* v. *Dwight*, 17 Mass. 289, 9 Am. Dec. 145; *Lamprey* v. *State*, 52 Minn. 181, 38 Am. St. Rep. 541, 18 L. R. A. 670, 53 N. W. 1139.)

The Yellowstone River is not navigable, but runs through a country where large herds of cattle are raised and where thousands of acres of alfalfa are raised to feed these cattle. For the purpose of watering these cattle, access to the river is a

very important and valuable right. (See *Lamprey* v. *State*, 52 Minn. 181, 38 Am. St. Rep. 541, 18 L. R. A. 670, 53 N. W. 1139.) Conveyance of the bed of a stream must be in writing, the same as other conveyances. (*Gilbert* v. *Eldridge*, 47 Minn. 210, 13 L. R. A. 411, 49 N. W. 679; *Miller* v. *Mendenhall*, 43 Minn. 95, 19 Am. St. Rep. 219, 8 L. R. A. 89, 44 N. W. 1141.)

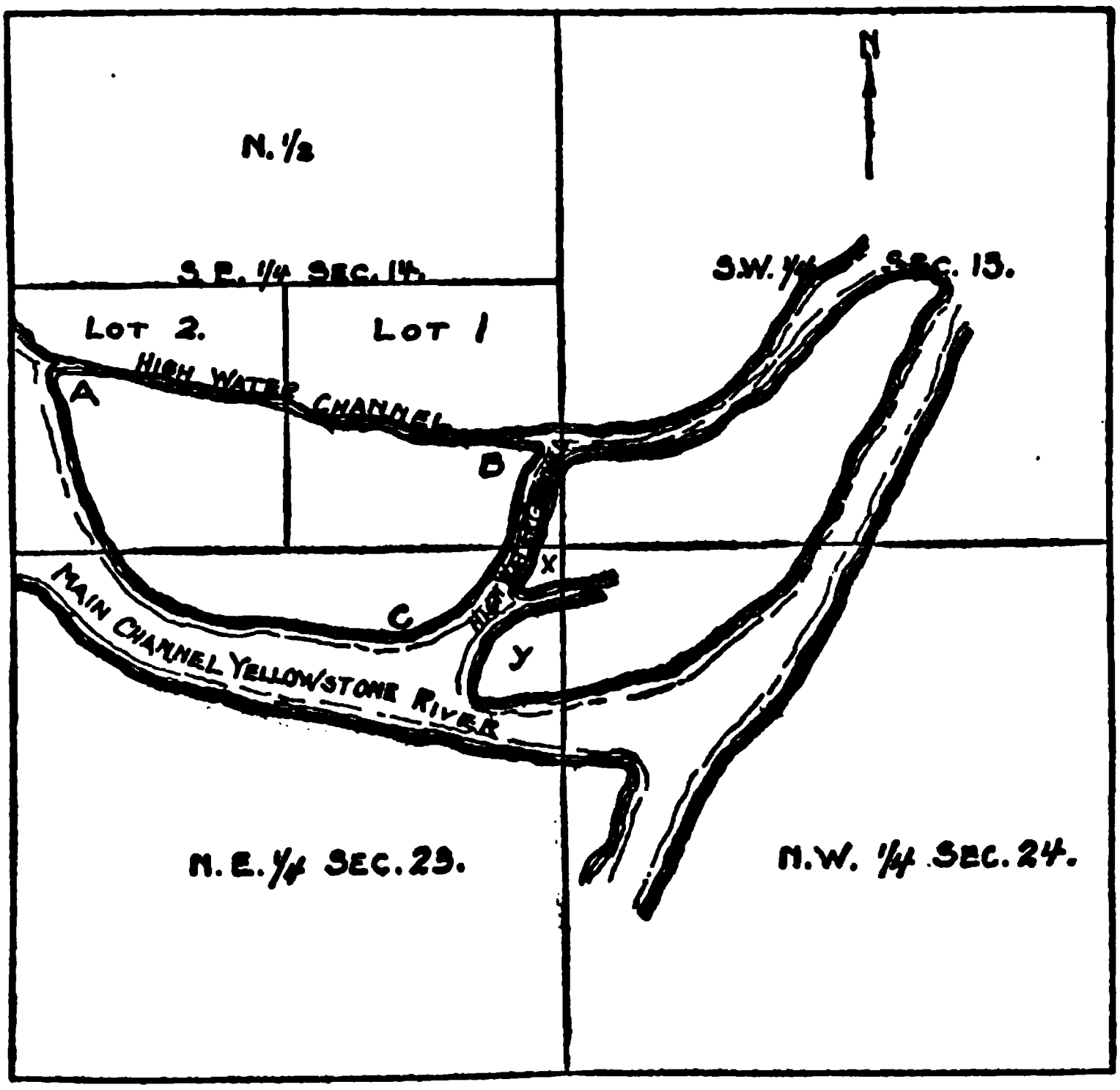
Messrs. Johnston & Coleman, for Respondents, submitted a brief; *Mr. J. H. Coleman* argued the cause orally.

We contend that the law as applied to the circumstances involved in the case at bar is as stated in the cases below, to-wit: That the islands in question being substantial pieces of land, containing in the aggregate from 150 to 175 acres at the time of the survey of the land north of the river, and the patent to plaintiff's predecessor specifying the grant to contain only 115 acres, and the government having surveyed these islands some time prior to the trial of this action, and permitted the defendant, Rollwitz, to make homestead entry thereon, the defendant was entitled to judgment. (*Scott* v. *Lettig*, 227 U. S. 229, 44 L. R. A. (n. s.) 107, 57 L. Ed. 490, 33 Sup. Ct. Rep. 242 [see, also, Rose's U. S. Notes]; *Gauthier* v. *Morrison*, 232 U. S. 452, 58 L. Ed. 680, 34 Sup. Ct. Rep. 384; *Producers' Oil Co.* v. *Hanzen*, 238 U. S. 325, 59 L. Ed. 1330, 35 Sup. Ct. Rep. 755; *Moss* v. *Ramey*, 239 U. S. 538, 60 L. Ed. 425, 36 Sup. Ct. Rep. 183; *Wilson & Co.* v. *United States*, 245 U. S. 24, 62 L. Ed. 128, 38 Sup. Ct. Rep. 21; *Horne* v. *Smith*, 159 U. S. 40, 40 L. Ed. 68, 15 Sup. Ct. Rep. 988.)

Opinion—PER CURIAM.

This cause arose out of a controversy between the plaintiff and defendants over the title and the right to the possession of an irregular tract of land situated in Yellowstone county, south of and adjacent to the homestead of plaintiff. The homestead is described as the north half of the southeast quarter and lots 1 and 2 of section 14 in township 2 south of range 24 east of the Montana principal meridian. The adjoined diagram, re-

duced copy of one made by a United States surveyor, at the time the disputed area was surveyed in April, 1916, illustrates the subject of the controversy.



The disputed area is indicated thereon by the letters A, B, C, and X and Y—that is to say, it is all the land lying between the east and west lines of the southeast quarter of section 14 and extending south to the present main channel of the Yellowstone River. The facts about which there is no controversy are the following: William Bode and plaintiff, husband and wife, made settlement on the homestead in the year 1880. Patent was issued to William Bode in 1890. In 1912 he and his wife were divorced, and upon a division of their property then made he conveyed the homestead to her. In 1878, when the township was surveyed, the main channel of the river flowed

through what is designated as the high-water channel north of the area A, B, C. According to that survey, lots 1 and 2 contained an area of 35.55 acres. The south line of these lots was meandered along the north shore. No account was then taken of any island in the river, further than that it was mentioned in the field-notes that there was an island south of the homestead and of the southwest quarter of section 13. Some time in the year 1885 or 1886 an ice gorge was formed in the main channel near the west boundary of the area A, B, C, with the result that it forced the water to the south side of the island, and that since that time the main channel has been on the south side. Gradually from year to year the old main channel was filled with washings of sand and gravel, particularly toward the west, until at the present time it is a shallow slough which has little or no current except when the river is at its high-water stage during the latter part of the spring or early part of the summer. The evidence leaves it somewhat in doubt whether the area A, B, C, with that lying to the east, constitutes in fact, one island, or whether it is divided into two by the "high-water channel" extending northward from the main channel. What the condition in this respect is is not now material, since the right of plaintiff to the possession of the area X and Y is not in question. The survey of the island was made under the direction of the Commissioner of the General Land Office upon the application of the defendants. Rollwitz was then occupying the area A, B, C, and Jones the part to the east and north, including the areas X and Y. Rollwitz was not himself qualified to acquire a homestead, but had made settlement upon the area A, B, C, on January 2, 1914, and improved it by erecting a residence and outbuildings thereon for the benefit of a daughter who lived with him, and intended to make entry of it as a homestead. At the time of the trial such entry had not been made. Jones had made his settlement on December 15, 1909, with the intention of acquiring title under the homestead law to the entire island area, including that occupied by Rollwitz. So far as the record shows

he had never made entry. Prior to the settlement by Rollwitz and Jones, the whole island area had been known as the Bode Island and had been used by Bode and his wife for pasture and a feeding ground for stock.

The evidence is somewhat voluminous, and, except as indicated above, is in sharp conflict, particularly with reference to whether the entire island area, at the time of Bode's settlement, was a well-defined and permanent body of land. There was evidence tending to show that all the area south of the homestead and of the southwest quarter of section 13 constituted one permanent body of land covered with timber and undergrowth. It further tended to show that some of the timber was of considerable size at the time the Bode settlement was made, and that during the following years, as indicated by the stumps still upon the ground, some of it had been used for fuel or lumber. Some of the trees standing at the time of the trial were thirty inches in diameter. There was also evidence to the effect that at the time the Bode settlement was made the area A, B, C, was merely a gravel bar; that it did not appear above the water except at the low water season; and that there was no timber or undergrowth at all upon it at that time.

The plaintiff claims title to the area in controversy on the theory that it is an accretion to her homestead, and that her southern boundary is the thread of the stream in its present position. The action was commenced as one in ejectment; the complaint being in the ordinary form, alleging title and right to possession in plaintiff and ouster by the defendants. The answer tendered issue by denials. It also alleged new matter in defense to which plaintiff made reply, but the issues in this connection were abandoned at the trial and do not require notice. The trial proceeded as though the action were one in equity to quiet plaintiff's title. The court submitted special interrogatories to a jury, in response to which they returned findings. Counsel for plaintiff and defendants both moved the court to reject certain of these findings and to adopt others

requested by them respectively. These motions were overruled. The court adopted some of the findings by the jury, made others, and concluded that the plaintiff was not entitled to any portion of the tract in controversy. It rendered judgment in favor of the defendants, declaring Rollwitz entitled to the possession of the area A, B, C, and Jones to the possession of the area X and Y. Plaintiff has appealed from the judgment in so far as it is favorable to Rollwitz. She has attempted to appeal also from the order rejecting certain findings of the jury, adopting others, and making further and additional findings and from the conclusions of law.

The action, having been tried with acquiescence of both [1] parties as one in equity, will be by us treated as the latter, both parties being bound by the theory adopted by the trial court, assented to by them. (*Moss* v. *Goodhart*, 47 Mont. 257, 131 Pac. 1071.)

The findings are, in brief, the following: That William Bode and his successors in interest occupied and used the tract A, B, C, up until the year 1914; that the plaintiff was occupying and using it at the time the defendant Rollwitz entered upon and took possession of it; that in 1880 the main channel of the Yellowstone River flowed through the so-called high-water channel between the Bode homestead and the so-called Bode Island (tract A, B, C); that Bode Island was a well-defined body of land in 1878, the time the township in which it is situated was surveyed; that there has been no appreciable change in the size or character of this tract since the original survey was made; that it contains from forty to fifty acres, fifteen acres of which are cultivable for the purpose of raising grain or grass, and that fifteen or twenty acres produce grass which is suitable for meadow or pasture land; that the main channel of Yellowstone River changed from the north to the south side of the island at some time in the year 1885; that this change in that year was very marked because of an ice gorge in the Yellowstone River at or about the place where the channel of the river divides at the west end of the island; that this change

[60 Mont. 481.]

of the channel, except as just indicated, was gradual; that the Yellowstone River at and above the island is not navigable; that the United States government, having executed and accepted a survey of both islands claimed by defendants has evidenced its intention of claiming the same as public domain subject to entry under the land laws of the United States and as not passing to the patentee of the land north of the Yellowstone River; that the tract upon which the defendant Jones lives was a well-defined body of land at the time the township in which it was situated was surveyed; that there has been no appreciable change in the size or character of this tract since the original survey was made; that this tract contains from 110 to 120 acres, about thirty-five acres of which may be cultivated either for the purpose of raising grain or grass; that, when the survey of the township was made, the main channel of the Yellowstone River was north of the area claimed by the defendant Jones; that at that time no part of either island was lying between the main channel of the Yellowstone River or the thread of the stream and the Bode homestead.

From these findings the court concluded that the area claimed by defendant Rollwitz is no part of the Bode homestead, and that title to it did not pass under the patent from the United States government to William Bode; that no part of the island claimed by the defendant Jones is a part of the Bode homestead, and that title to no part of this area passed to William Bode under the patent from the United States government; that plaintiff is not entitled to recover any part of the island claimed by the defendant Rollwitz nor any part of that claimed by the defendant Jones.

The brief of counsel contains thirty-two specifications of error, to most of which he addresses special argument, but, taken together, they present only two questions which require consideration, *viz.*: Does the evidence justify the findings? [2] and did the court draw the correct conclusion from them? However, before taking up these questions, the attempted appeals from the order made rejecting the findings of the jury,

etc., may be disposed of by the remark that such an order is not appealable because not enumerated among those from which an appeal is provided for by the statute. (Rev. Codes, sec. 7098.) All questions sought to be raised by this attempted appeal are properly reviewable upon the appeal from the judgment. These remarks also dispose of the attempted appeal from the conclusions of law. The appeals are ineffective for any purposes, and are therefore dismissed.

From a careful review of the record, we are of opinion that the evidence amply supports the findings of fact. With this statement we are content to dispose of this question, as further reference to the evidence warranting the findings would serve no useful purpose, and extend this opinion to unnecessary length.

It is provided by section 4573 of the Revised Codes: "Where [3] from natural causes, land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank"; and further by section 4576, as follows: "An island, or accumulation of land, formed in a stream which is not navigable, belongs to the owner of the shore on that side where the island or accumulation is formed; or, if not formed on one side only, to the owners of the shore on the two sides, divided by an imaginary line drawn through the middle of the river."

This is the common-law rule, and the cases quite generally hold in accord therewith. Accreted lands—that is, additions to the area of real estate from the gradual deposit by water of solid material, whether mud, sand or sediment, producing dry land which before was covered by water, along the banks of a navigable or unnavigable stream—belong to the riparian owner. (1 R. C. L. 228; 40 Cyc. 622; *Whitaker* v. *McBride*, 197 U. S. 510, 49 L. Ed. 857, 25 Sup. Ct. Rep. 530; *Tappendorff* v. *Downing*, 76 Cal. 169, 18 Pac. 247; *Fillmore* v. *Jennings*, 78 Cal. 634, 21 Pac. 536; *Steers* v. *City of Brooklyn*, 101 N. Y.

51, 4 N. E. 7; *Black* v. *Diver*, 68 Kan. 204, 74 Pac. 1123; *McBride* v. *Steinweden*, 72 Kan. 508, 83 Pac. 822; *Wood* v. *McAlpine*, 85 Kan. 657, 118 Pac. 1060; *Sun Dial Ranch* v. *May Land Co.*, 61 Or. 205, 119 Pac. 758; *Spinning* v. *Pugh*, 65 Wash. 490, 118 Pac. 635.)

Question arises as to whether or not the lands in controversy are accretions. If not, clearly the law relative thereto does not [4] apply. The settled rule is that title to lands acquired by accretion or reliction are governed by the laws of the state where either occurs (1 R. C. L. 228; *Hardin* v. *Jordan*, 140 U. S. 371, 35 L. Ed. 428, 11 Sup. Ct. Rep. 808, 838; *Producers' Oil Co.* v. *Hanzen*, 238 U. S. 325, 59 L. Ed. 1330, 35 Sup. Ct. Rep. 755; *United States* v. *Mission Rock Co.*, 189 U. S. 391, 47 L. Ed. 865, 23 Sup. Ct. Rep. 606), and we recognize and [5] subscribe to the doctrine that, where in the survey of the public domain a body of water or lake is found to exist and is meandered, the result of such meander is to exclude the area from the survey, and to cause it as thus separated to become subject to riparian rights of the respective owners abutting on the meandered line in accordance with the laws of the several states (*Hardin* v. *Jordan, supra; Kean* v. *Calumet Canal Co.*, 190 U. S. 452–459, 47 L. Ed. 1134, 23 Sup. Ct. Rep. 651; *Hardin* v. *Shedd*, 190 U. S. 508–519, 47 L. Ed. 1156, 23 Sup. Ct. Rep. 685; *Wilson & Co.* v. *United States*, 245 U. S. 29, 62 L. Ed. 128, 38 Sup. Ct. Rep. 21). But is this rule applicable to the facts before us in the instant case? We think not. The law governing accretions or relictions does not ap- [6, 7] ply: First, because of the sudden and perceptible channel change worked by the ice gorge; and, second, because the islands were in existence at the time of the original survey. The change in the channel of the stream resulting from the ice gorge could not, and did not, have the effect of extending the southern boundary of plaintiff's lands so as to pass over and include the old river-bed and lands lying beyond and south thereof, without regard to the extent of the change to the thread of the new channel formed.

[60 Mont. 481.]

Where the channel of a river is suddenly and sensibly changed, as by reason of an ice gorge, so that the old channel is abandoned, except in high water, and a new channel formed, no change in the boundary or ownership of land riparian owners is worked thereby. (1 R. C. L. 228; *Warren* v. *Chambers*, 25 Ark. 120, 91 Am. Dec. 538, 4 Am. Rep. 23; *Wallace* v. *Driver*, 61 Ark. 429, 31 L. R. A. 317, 33 S. W. 641; *Fowler* v. *Wood*, 73 Kan. 511, 117 Am. St. Rep. 534, 6 L. R. A. (n. s.) 162, 85 Pac. 763; Gould on Waters, sec. 158; 5 Cyc. 904; 40 Cyc. 622; *St. Louis* v. *Rutz*, 138 U. S. 226, 34 L. Ed. 941, 11 Sup. Ct. Rep. 337.)

Although the land in dispute was in the possession and occupancy of the plaintiff and her predecessor in interest for more than thirty years, neither she nor her grantor could secure title to it by adverse possession, use or occupancy for any length of time as against the government. (1 R. C. L. 87; 2 C. J., sec. 440; *Boglino* v. *Giorgetta*, 20 Colo. App. 338, 78 Pac. 612.) It appears that at the time of the survey in 1878 these islands were in existence and approximately of the same area as now, lying south of the thread of the old main channel, and, while not shown on the official plat, yet they are mentioned and referred to in the field-notes of the surveyor, from [8] which the plat was prepared. The surveyor is not invested with authority to determine the character of land surveyed or left unsurveyed or to classify it as within or without the operation of particular laws. (*Gauthier* v. *Morrison*, 232 U. S. 452, 58 L. Ed. 680, 34 Sup. Ct. Rep. 384.)

In *Barden* v. *Northern Pacific R. R. Co.*, 154 U. S. 288, 292, 38 L. Ed. 992, 14 Sup. Ct. Rep. 1030, in disposing of a contention that the lands there in question had been determined and reported by the surveyor as agricultural and not mineral, and that the determination and report remained in force, the court said (154 U. S. 320, 38 L. Ed. 992, 14 Sup. Ct. Rep. 1035): "But the conclusive answer to such alleged determination and report is that the matters to which they relate were not left to the surveyor-general. Neither he nor

any of his subordinates was authorized to determine finally the character of any lands granted or make any binding report thereon. Information of the character of all lands surveyed is required of surveying officers, so far as knowledge respecting them is obtained in the course of their duties, but they are not clothed with authority to especially examine as to these matters outside of their other duties, or determine them, nor does their report have any binding force. It is simply an addition made to the general information obtained from different sources on the subject."

The error of the surveyor in failing to extend the survey over the islands in the river did not make them less a part of the public domain; and the government was not thereby divested of title, or prevented from subsequently surveying the same and asserting its title thereto. (*Gauthier* v. *Morrison, supra; Scott* v. *Lattig,* 227 U. S. 229, 44 L. R. A. (n. s.) 107, 57 L. Ed. 490, 33 Sup. Ct. Rep. 242; *Wilson & Co.* v. *United States, supra.*) And the fact that administrative government [9] officers, before discovery of the error, have treated such a meandered tract as subject to the riparian rights of abutting owners, under the state laws, cannot estop the United States from asserting its title, even as against such an owner, who acquired his property before the mistake was discovered. (*Wilson & Co.* v. *United States, supra.*)

The inference naturally arising from the failure of the plat to show the existence and location of islands at the time of the survey is refutable, and in this case the evidence does refute this inference and demonstrates existence of these islands in their present condition at the time of the survey; and error of the public surveyor in failing to extend a survey over an island in a river does not make it any the less a part of the public [10] domain. Patents to lots of land abutting on a river do not include actual islands of fast dry land of stable foundation lying between the lots and the thread of the stream. (*Moss* v. *Ramey,* 239 U. S. 538, 60 L. Ed. 425, 36 Sup. Ct. Rep. 183.)

[60 Mont. 481.]

An error in omitting an island in a navigable or non-navigable stream does not divest the United States of the title, or interpose any obstacle to surveying it at a later time, and homesteaders or purchasers of fractional interests or subdivisions on the bank of a non-navigable stream do not acquire title to an island on the other side of the channel merely because the island was omitted from the survey. (*Scott* v. *Lattig, supra.*)

The islands in question having an existence at the time of the survey of the lands belonging to the plaintiff, and then comprising approximately 170 acres, they must be considered as unsurveyed government land. As was well stated by Gantt, J., in *Lemmers* v. *Nissen,* 4 Neb. 245: "The mere fact that it is run [the meander line] and is designated upon the plats as a meandered line certainly cannot be conclusive in the matter. To establish the doctrine that such meander line is conclusive would estop the government of disposing of lands left unsurveyed between such line and the bank of the stream, and would prevent the correction of mistakes made by surveyors in such case, and would be in direct conflict with the well-settled rule of law defining what is an accretion to land." (See, also, *Bissell* v. *Fletcher,* 19 Neb. 725, 28 N. W. 303.)

The plaintiff's contention is that by a survey of the north shore of the Yellowstone River, failing to include the islands, they pass by patent with the lands on the shore directly north of the same. The trial court's finding No. 13 determined that at the time of the survey the land in question lay south of the main channel of the river, and this finding is warranted from the evidence. This being true, and conceding the boundary of plaintiff's land on the southern portion thereof to be the middle of the stream, at time of entry in 1880, neither she nor her predecessor in interest could acquire title to the island. And there is nothing in the evidence or findings to show whether the land south of the river was ever surveyed, and, if so, whether the island in question was included in such survey. Consequently there is nothing in the evidence upon which a

claim can be based that the United States, by failure to survey the island, impliedly or otherwise surrendered title thereto. The evidence supports the finding of the court that the federal government has executed and accepted a survey of the islands claimed by the defendants, although there is nothing to indicate when such survey was made. The survey of these islands by the federal government indicates an assertion of ownership to the exclusion of all persons whatsoever.

In making the survey in 1878, it was the duty of the surveyor, if the islands were there at that time, to ascertain their location and to meander their exterior boundaries and enter both in the field-notes of the survey, and the failure to represent the islands on the plat prepared from the field-notes naturally suggests that the islands may not have been in existence at the time of the survey, although the field-notes themselves show the existence and location of such islands. The official plat is effectually refuted by reference to the field-notes of the survey, as well as the physical facts, namely, the size, elevation, appearance of the islands, the character and extent of vegetation, and trees grown thereon. The error in omitting it from the survey did not divest the United States of its title, or interpose any obstacle to the survey thereof at a later date. Neither was the error calculated to induce purchasers of fractional subdivisions on the north bank to believe that by securing homestead title to 115 acres they would also receive title to 160 or 170 acres of land in addition thereto lying to the south of the thread of the stream. (See *Horne* v. *Smith*, 159 U. S. 40, 40 L. Ed. 68, 15 Sup. Ct. Rep. 988; *Niles* v. *Cedar Point Club*, 175 U. S. 300, 44 L. Ed. 171, 20 Sup. Ct. Rep. 124; *Scott* v. *Lattig, supra.*)

The grant by patent to the plaintiff and her predecessor in interest was for certain described lands, containing 115 acres according to the official plat thereof, whereas, the body of land embraced in these islands at the time of survey was from 160 to 170 acres.

[60 Mont. 481.]

To sustain plaintiff's claim to the area A, B, C, under the patent to William Bode, her husband, to the land meandered on the north bank of the river, would be to enlarge the grant which the government actually intended to make, and did make, to William Bode, with the result that she would secure a much larger area of the public land than Bode ever expected to receive under the patent.

In this case the official plat of the survey is sufficiently and satisfactorily refuted by the testimony and the original field-notes from which the plat was prepared; and it appearing that the islands were not a part of the bed of the river at the time the survey (1878) was made, nor when Montana was admitted to the Union of states (1889), but actually existed substantially the same as now, title did not pass to the state, but remained as before, public land under government ownership and control. (*Moss* v. *Ramey, supra.*)

Under the homestead laws of the United States, unsurveyed [11] public lands, if agricultural and unappropriated, are open to settlement by qualified entrymen, and this applies to lands such as those involved, unsurveyed by the surveyor, and by him included within the meander lines of a non-navigable river. (*Gauthier* v. *Morrison, supra.*) And, while the courts [12] have nothing to do with public land surveys or the revision thereof, yet they may determine whether lands have been left unsurveyed and whether a right of possession exists under an inceptive claim. (*Gauthier* v. *Morrison, supra.*)

From a careful review of the record and of the findings of fact and conclusions of law, upon which the judgment is predicated, we are unable to find error, and the judgment is affirmed.

Affirmed.

INTERNATIONAL HARVESTER CO., APPELLANT, v. MERRY ET AL., RESPONDENTS.

(No. 4,341.)

(Submitted April 14, 1921. Decided July 1, 1921.)

[199 Pac. 704.]

Promissory Notes—Foreclosure of Mortgages—Pleading and Practice—Inconsistent Defenses—Election of Remedies—Waiver—Compromise and Settlement—Actionable Fraud—Breaking of Promise—Intent.

Promissory Notes—Pleading—Inconsistent Defenses—Election of Remedies.

1. Where, in an action on a promissory note and to foreclose a mortgage, defendants denied generally the making and delivery of the instruments, and in two special defenses alleged affirmatively that they were in fact executed and delivered to plaintiff, and in a third pleaded fraud, the pleading was so incongruous as to require them to elect upon which defense they intended to rely, under the rule that while inconsistent defenses may be pleaded, they must not be so incompatible with each other that if one be true, the other must of necessity be false.

Same—Inconsistent Defenses—Waiver of All Defenses Pleaded, When.

2. *Held*, under the condition of the answer set forth in paragraph 1 above, that the statements of defendants' counsel that they would waive all special defenses except that of fraud, and, upon an adverse ruling upon the sufficiency of the latter defense, that they would rest, amounted to a waiver and abandonment of all the other defenses pleaded.

Same—Compromise and Settlement—Answer—Readiness and Ability to Perform.

3. Where settlement and compromise are alleged in answer to a complaint on a promissory note, whereby plaintiff harvester company was to take back a plowing outfit, defendants to pay plaintiff a certain sum, it was incumbent upon defendants to plead their readiness and ability to perform their part of the undertaking.

Fraud—Breaking of Promise—Intent.

4. The mere making of a promise which the promisor fails to keep does not constitute actionable fraud, intention not to keep it when it was made, being necessary to constitute the promisor's action fraudulent, under section 4978, Revised Codes.

Appeal from District Court, Prairie County, in the Sixteenth Judicial District; Jos. C. Smith, a Judge of the Fifth District, presiding.

---

1. Right to plead inconsistent defenses, see note in Ann. Cas. 1917C, 705.

[60 Mont. 498.]

ACTION by the International Harvester Company against Myra Day Merry and others. Judgment for plaintiff. From an order granting new trial, plaintiff appeals. Reversed.

Mr. Stephen J. Leahy, Mr. Albert Anderson and *Messrs. Miller, Zuger & Tillotson,* submitted a brief in behalf of Appellant; *Mr. Andrew Miller,* of the Bar of Bismarck, North Dakota, argued the cause orally.

A new trial was granted solely on the naked legal ground that, apart from the pretended defense of fraud which was held insufficient, and apart from the defenses specifically waived in open court, there still remained one or more defenses pleaded by general denial in the answer, under which defendants could offer proof.

The question is: After having waived all affirmative defenses except fraud, and the court having held the alleged defense of fraud bad, were there left any defenses covered by a general denial under which defendants could introduce evidence? Appellant contends not, because the law is that a general denial is always qualified or limited by any admission or inconsistent allegations in the pleading. (*Hannem* v. *Pence,* 40 Minn. 127, 12 Am. St. Rep. 717, 41 N. W. 657; *Rhinehart* v. *Whitehead,* 64 Wis. 42, 24 N. W. 401; *Dickson* v. *Cole,* 34 Wis. 621; *Butler* v. *Kaulback,* 8 Kan. 668; *Seattle National Bank* v. *Jones,* 13 Wash. 281, 48 L. R. A. 177, 43 Pac. 331; *Baird* v. *Morford,* 29 Iowa, 531.) If it should be suggested that the authorities above cited are not in harmony with other authorities, holding that admissions in inconsistent, separate defenses in one plea, under our Code, may not be used to destroy the effect of another plea, we respectfully call the attention of the court to the fact that the point in this case is not whether an admission in one separate affirmative defense may be used to destroy the effect of another separate affirmative defense, nor whether an admission in an affirmative defense may be used to destroy a general denial; for although the trial court, in its order granting the new trial herein, in-

timated and stated that the amended answer herein contained a general denial, such intimation is erroneous. The amended answer contains a qualified general denial, denying only the matters and things not expressly admitted, qualified or denied, and is as follows: "9. That these answering defendants deny generally and specifically each and every allegation, matter and thing contained in plaintiff's complaint filed herein not in this amended answer expressly admitted, qualified or denied." The rule is that a qualified general denial does not place in issue those allegations of the complaint which are admitted in other paragraphs of the answer. (*Kennedy* v. *Dennstadt,* 31 N. D. 422, 154 N. W. 271; *Branthover* v. *Monarch Elevator Co.,* 33 N. D. 454, 156 N. W. 927.) Appellant contends that every defense that could possibly be covered by a general denial is waived by specific admissions in other parts of the pleading.

Messrs. Loud & Leavitt, for Respondents, submitted a brief; *Mr. Chas. H. Loud* argued the cause orally.

Counsel for appellant make the claim that the defendants were not entitled to introduce any proof under their denial because there are some statements in the affirmative defense in their answer whereby the denial of the delivery contained in the first defense of respondents' answer would be overcome. Even admitting for the sake of argument that statements contained in a special defense full and complete in itself can be used as an admission to affect denials or allegations contained in another separate defense, full and complete in itself, we contend that there are no statements in the affirmative defense that in anywise contradict the position taken by the respondents that no delivery of the note and mortgage had been made, for the reason that it is apparent therefrom that there was no such intention to deliver the note and mortgage as is contemplated by the provisions of section 5864 of the Revised Codes. If there was a delivery of these documents, such delivery was made by reason and on account of the

fraudulent representations set forth in such defense. In this state inconsistent defenses may be interposed by the defendant, provided they are not so inconsistent that if the allegations of one are true the allegations of the other must of necessity be false. (*Johnson* v. *Butte & Superior Copper Co.*, 41 Mont. 158, 48 L. R. A. (n. s.) 938, 108 Pac. 1057; *O'Donnell* v. *City of Butte*, 44 Mont. 97, 119 Pac. 281.) Judging the pleading in question by this rule, we do not find any such inconsistency in the allegations of the special defense as would render these allegations destructive of the general denial contained in the answer so as to change this denial into an admission.

Assuming for the sake of argument that the respondents were not entitled to introduce any proof under the general denial, and that the court in granting a new trial and basing its action upon the supposed error in the exclusion of this testimony was wrong, still we insist that the court's action was correct in the premises although a wrong reason was given therefor. This court has several times held that it is the duty of the court in cases of this character to examine into all of the errors of law specified, and if it appear from the whole record that the new trial was not improperly granted, the order will be affirmed. (*Menard* v. *Montana Cent. Ry. Co.*, 22 Mont. 340, 56 Pac. 592; *Melzner* v. *Trucano*, 51 Mont. 23, 149 Pac. 365; *Stephens* v. *Conley*, 48 Mont. 363, Ann. Cas. 1915D, 958, 138 Pac. 189; *City of Butte* v. *Goodwin*, 47 Mont. 155, Ann. Cas. 1914C, 1012, 134 Pac. 670; *Berry* v. *Badger*, 54 Mont. 224, 169 Pac. 34.)

MR. JUSTICE COOPER delivered the opinion of the court.

This action was brought to enforce payment of a promissory note in the sum of $4,437.77, and to foreclose a mortgage upon the real estate of defendants, situated in Custer county.

The complaint alleges that defendants have failed to pay the principal or interest due thereon, except the sum of $128.20 indorsed on the note. The answer denies that the note and

mortgage were ever delivered to plaintiff, or that it now possesses or owns the same, or that the sum of $128.20 is the full amount to which credit should be given them thereon. Affirmatively defendants allege that on September 14, 1912, they purchased an engine and plowing outfit from plaintiff for the sum of $3,750, and gave a note to evidence the debt which they secured by a mortgage upon their real estate above mentioned. They further allege that the note and mortgage in suit are renewals of the original obligations, and that William A. Bell, acting as agent for the plaintiff, with intent to cheat and defraud them out of their land, falsely and fraudulently promised and represented to them that, if they would redeliver the engine and plowing outfit to him, as plaintiff's agent, and pay him the sum of $1,250, "as soon as they could negotiate a loan" upon their said real estate, the plaintiff would return all their written obligations to them, satisfy them, and defendants would then be released from further liability thereon; that, in furtherance of his purpose, he fraudulently represented to defendants that the only purpose in obtaining the renewal note and mortgage was to satisfy the plaintiff's Chicago office of their good intentions to insure the settlement, and to comply with a rule of that office in transactions of that nature. The same compromise agreement is pleaded in another distinct defense without any averment that fraud was resorted to for the purpose of inducing its making or delivery. As other matters of defense, it is alleged that defendants performed services for a person acting as agent for the plaintiff, for which they were not allowed proper credit, and that the quality and capacity of the machinery were insufficient for the work for which they were sold to them. The prayer of the answer is that judgment be given for the defendants, and that all their obligations to plaintiff be canceled and annulled. The reply consists of general denials of all the affirmative matters of defense.

Upon the trial the plaintiff offered evidence to show the [1, 2] execution and delivery of the note and mortgage set

forth in the complaint, that it was the owner thereof, and that the only amount paid thereon by defendants is the sum of $128.20 as alleged. The plaintiff then rested, and Dennis R. Merry was sworn, and testified that he was one of the defendants, and gave his name. Whereupon counsel for plaintiff objected to the introduction of any evidence in support of the allegations of fraud, because of their insufficiency to charge actionable fraud, or new matter that would amount to a counterclaim; and that it was an attempt to vary the terms of a written contract. Mr. Leavitt, of counsel for defendants, then stated that they would waive all special defenses except the special defense of fraud. The court then sustained plaintiff's objection, and, upon request of counsel, defendants were given sixty days within which "to prepare, serve, and file a bill of exceptions." Mr. Leavitt then said: "In view of the court's ruling, the defendants rest." Responding to the direction of the court in that behalf, the jury returned a verdict for plaintiff in the amount claimed, and judgment was rendered and entered accordingly. This appeal is from the order of the district court granting a new trial.

Plaintiff's position is that the statements of counsel that defendants would waive "all special defenses except the special defense of fraud," and, after the court had overruled the defense of fraud, that defendants would rest their case, amounted to a waiver and abandonment of all the other defenses pleaded. The contention of counsel must be sustained. The affirmative defenses are so at variance with the general denials that both cannot be true. By the rule announced in *O'Donnell* v. *City of Butte,* 44 Mont. 97, 119 Pac. 281, a defendant may plead as many inconsistent defenses as he may choose, but they must not be so incompatible with each other that if one is true the other must be false. The answer denies the making or delivery of the note and mortgage, and, in two separate and distinct affirmative defenses, directly alleges that they *were* in fact executed and delivered to plaintiff. The incongruity of a pleading which denies matter in one paragraph, makes the

same thing a full and substantive defense in another, and in still another impugns the entire transaction as fraudulent and deceitful, is too palpable to admit of argument, and furnishes ground enough to compel the pleader to elect upon which allegation he intends to rely upon the trial. Otherwise the opposing party cannot know, until the case is made out against him, what proof he is called upon to rebut. A situation so dubitable was enough to perplex both court and opposing counsel, and in all probability induced the court to change its mind and grant a new trial. The effect of counsel's statement, waiving all special defenses except the special defense of fraud, and later, upon an adverse ruling upon the sufficiency of his defense of fraud, announcing that defendants would rest, was tantamount to an admission that he had no other defense to offer, and would therefore accept the ruling of the court.

The note and mortgage set forth in the complaint were re-
[3] newals of the obligations given as security for the purchase price of the machinery in the first place. Their cancellation could not, and would not, in view of the admission that the machinery had been in the possession of defendants ever since its purchase, and had been used by them for a period of four years, serve to discharge the original obligation nor restore the parties to their original status. Assuming the truth of their allegations that a settlement and compromise were effected whereby the plaintiff was to take back the engine and plowing outfit and defendants were to pay plaintiff the sum of $1,250 as a consideration therefor, without a showing of their readiness and ability to perform their part of the undertaking, that defense was not maintained. (*Holton* v.
[4] *Noble,* 83 Cal. 7, 23 Pac. 58.) The mere making of a promise which the promisor fails to keep does not constitute actionable fraud. (*Rheingans* v. *Smith,* 161 Cal. 362, Ann. Cas. 1913B, 1140, 119 Pac. 494; *Hickman* v. *Johnson,* 36 Cal. App. 342, 178 Pac. 145.)

There being no allegation in the answer, nor proof that Bell did not intend to keep his promise to cancel and return

the papers to defendants, and no offer by defendants to perform their part of the settlement agreement by payment of the money, a defense upon that ground is not sustained. The ruling of the trial court was correct. (Rev. Codes, sec. 4978.) The verdict and judgment should have been allowed to stand.

The order granting a new trial is reversed, with directions to set it aside.

Reversed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, HOLLOWAY and GALEN concur.

KEITH, RESPONDENT, v. GREAT NORTHERN RAILWAY CO., APPELLANT.

(No. 4,430.)

(Submitted June 9, 1921. Decided July 1, 1921.)

[199 Pac. 718.]

Railroads — Crossing Accident — Automobiles — Contributory Negligence—Failure to Look and Listen.

Railroads—Crossing Accident—Automobiles—Duty to Make Act of Looking and Listening Effective.

1. One approaching a railroad crossing must use his senses vigilantly to determine whether or not a train is approaching before he goes on the track, and if necessary to make his act of looking and listening reasonably effective, stop at such point as will accomplish that purpose.

Same—Evidence—Contributory Negligence.

2. Where, in an action to recover damages for injuries to plaintiff's automobile caused by a collision with defendant's train at a railroad crossing, it appeared from the evidence that, after he saw the train, he had twenty-six feet before he reached the crossing within which to stop, and could have stopped within a distance of seven feet if traveling at a rate of eight miles an hour, as testified to by him, with the car under proper control, and that he did not apply the brakes until after the front wheels of his automobile were on the track, he was guilty of contributory negligence as a matter of law, and therefore barred from recovery of damages.

---

1. On duty of driver of automobile as to stopping, looking and listening before crossing railroad track, see notes in **Ann. Cas. 1915B, 682; Ann. Cas. 1915B, 678; 46 L. R. A. (n. s.) 702.**

[60 Mont. 505.]

Appeal from District Court, Lewis and Clark County; R. Lee Word, Judge.

ACTION by Forrest E. Keith against the Great Northern Railway Company. Judgment for plaintiff. Defendant appeals. Reversed, with directions to enter judgment for defendant.

Mr. I. Parker Veazey, Jr., *Mr. W. H. Clift*, and *Mr. R. H. Glover*, for Appellant, submitted a brief; *Mr. Clift* argued the cause orally.

It was contended on the trial that the opinions of this court in the *Mason Case* (*Mason* v. *Northern Pac. R. Co.*, 45 Mont. 474, 124 Pac. 271) and the *Walters Case* (*Walters* v. *Chicago, M. & P. S. R. Co.*, 47 Mont. 501, 46 L. R. A. (n. s.) 702, 133 Pac. 357) had so modified the "stop, look and listen" doctrine, that the rules enunciated in the *Hunter Case* (*Hunter* v. *Montana Cent. R. Co.*, 22 Mont. 525, 57 Pac. 140), the *Sprague Case* (*Sprague* v. *Northern Pac. R. Co.*, 40 Mont. 481, 107 Pac. 412), and in the *Meehan Case* (*Meehan* v. *Great Northern R. Co.*, 43 Mont. 72, 114 Pac. 781) were no longer in effect in this state; that the traveler on the highway is not now required to either stop, look or listen, in approaching a railroad crossing, and that by virtue of the rules laid down in the *Mason* and *Walters Cases*, crossing cases, socalled, no longer involve anything but questions of fact for a jury. We do not so interpret the decisions in the *Mason* and *Walters Cases*. In the latter case, the *Sprague* and *Hunter Cases* are cited as authorities, and there is nothing in either the *Mason* or *Walters Case* which amounts to even an implied overruling of the doctrine previously laid down by this court in the earlier cases. Even though it may be said that the traveler is charged merely with the duty of exercising ordinary care and prudence in approaching a railroad crossing, he is remiss in his duty if he fails to use his senses as he approaches the crossing and look and listen for trains which might be

approaching, stopping, if necessary, to make the looking and listening effective; and a traveler on a public highway cannot escape the charge of contributory negligence if he drives an automobile on to a railroad track at a crossing where the view of approaching trains is so obscured that looking and listening would be futile unless he stops in a place of safety near the track and there attempts to look and listen for approaching trains. (*Ft. Wayne & N. I. Traction Co.* v. *Schoeff*, 56 Ind. App. 540, 105 N. E. 924; *Dernberger* v. *Baltimore & O. R. Co.*, 243 Fed. 41; *Thompson* v. *Southern Pac. Co.*, 31 Cal. App. 567, 161 Pac. 23; *Fluckey* v. *Southern Ry. Co.*, 242 Fed. 470; *Beemer* v. *Chicago, R. I. & P. Ry. Co.*, 181 Iowa, 642, 162 N. W. 43; *Robinson* v. *Oregon-Wash. R. & N. Co.*, 90 Or. 490, 176 Pac. 594; *Pershing* v. *Detroit G. H. & N. Ry. Co.*, 206 Mich. 304, 172 N. W. 530; *Hanigan* v. *Philadelphia & R. R. Co.*, 257 Pa. 236, 101 Atl. 640; *Cline* v. *Chicago, M. & St. P. Ry. Co.*, 198 Ill. App. 163; *Nucci* v. *Colorado & S. Ry. Co.*, 63 Colo. 582, 169 Pac. 273.)

While in the light of the foregoing decisions it is not negligence *per se* in all cases for travelers on public roads and streets, on approaching a railroad crossing, not to stop as well as to look and listen for trains before attempting to cross the track, yet in a case where there is no room for an honest difference between reasonable minds as to whether or not the driving on to the railroad track was consistent with the care that a man of ordinary prudence would use under the circumstances, the court may find as a matter of law that plaintiff is guilty of negligence contributing to his injury.

Mr. H. S. Hepner, for Respondent, submitted a brief and argued the cause orally.

MR. JUSTICE REYNOLDS delivered the opinion of the court.

Plaintiff brought action against defendant to recover damages to a Ford automobile and sewing-machine by reason of

their being struck by a train of defendant company at its crossing on Oak Street, in the city of Helena. Verdict and judgment were rendered in favor of plaintiff. Defendant appeals from the judgment.

The vital point involved in these appeals is whether or not plaintiff was guilty of contributory negligence as a matter of law, barring his recovery. The evidence discloses the following undisputed facts: Oak Street runs in a northerly and southerly direction. As plaintiff approached the crossing from the north, he was proceeding at a rate of speed in excess of eight miles an hour. The view of the railroad track was obstructed by buildings on each side of the street until he reached approximately the northerly line of the right of way. Plaintiff's own testimony was that he was about twenty-six feet from the north rail of the track when he first saw the train, which was then heading into the block. His statement of his actions from the time he saw the train was as follows: "When I came in sight of the road [railroad] I saw the train coming, and I shut off, and I thought it would easily stop before I got in front of the train, at the speed it was going. I shut her right off. The front wheel went across the track. It is planked for only one rig, one team, or whatever it might be to cross, and when she came around, the front wheel had touched the track; the right front wheel came off the planking and struck this rail, that is, the rail next to me, the way I was coming up, and it skidded me down the track. I put the brake on and jumped off as I saw it. It probably went three or four feet before it stopped."

From the foregoing statement it appears that from the time plaintiff saw the train until he reached the track he merely shut off the power and allowed the car to coast, but did not apply the brakes, thinking that the automobile would stop before he reached the track. It coasted farther than he thought it would, and the right front wheel went off the planking, struck the rail, and caused the automobile to skid down the track, at which time he applied the brake, stopping it within

three or four feet from the planking. The automobile was a comparatively new one, and the brakes were in good condition.

The rule as to the caution with which one must approach [1] a railroad crossing in this state without being guilty of negligence has been thoroughly established, and requires a person to use his senses vigilantly to determine whether or not a train is approaching, before he goes upon the track. This requires that he use his eyes and ears, and, if necessary to make his looking and listening reasonably effective, he must stop at such point as will accomplish that purpose. The case of *George* v. *Northern Pac. Ry. Co.*, 59 Mont. 162, 196 Pac. 870, involves facts very similar to those of this case, and is conclusive upon the question here to be determined. There the rule is stated by Chief Justice Brantly, as follows: "This statement of the rule requires the person approaching a railway crossing to take all reasonable precaution to assure himself by actual observation that there is no danger from an approaching train. The failure of the persons in charge of the train to keep a lookout and to give warning signals of its approach to the crossing does not relieve the traveler from the necessity of making a vigilant use of his senses to ascertain whether it is safe to proceed. (*Railroad Co.* v. *Houston*, 95 U. S. 697, 24 L. Ed. 542 [see, also, Rose's U. S. Notes]; *Hunter* v. *Montana Central Ry. Co.*, 22 Mont. 525, 57 Pac. 140.) It is not always sufficient if he does look and listen. The obligation resting upon him is to exercise care to make the act of looking and listening reasonably effective. (*Sprague* v. *Northern Pac. Ry. Co.*, 40 Mont. 481, 107 Pac. 412.) If he goes upon the crossing without taking this precaution, he is guilty of contributory negligence, and, if injured, cannot recover."

From the evidence in this case it appears that if plaintiff was [2] not traveling to exceed eight or ten miles an hour, he could have stopped his automobile within a space of seven feet without injury to the car. He had twenty-six feet after he saw the train within which to make his stop. The conclusion is

irresistible, either that he was traveling at a rate of speed so far in excess of eight miles an hour that he did not have his car under proper control so that he could stop within the twenty-six feet, or, if he was not traveling to exceed the eight miles an hour as he testified, that he did not use reasonable or ordinary diligence to bring his car to a stop. From his own testimony he did not even apply the brakes until after the front wheel was on the track. These facts present a situation of inexcusable neglect and failure even to use the means at his disposal for his safety, and which, it would seem, would be the first means to be applied by any ordinary person to escape the danger of the approaching train after such danger was seen. The plaintiff was guilty of contributory negligence, as a matter of law, without which the accident would not have happened and which is a complete bar to his recovery.

The judgment is reversed, with directions to the district court to enter judgment for defendant.

Reversed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES COOPER, HOLLOWAY and GALEN concur.

MANNIX, APPELLANT, *v.* POWELL COUNTY, RESPONDENT.

(No. 4,421.)

(Submitted June 8, 1921. Decided July 1, 1921.)

[199 Pac. 914.]

Quieting Title—Easements—Right of Way—Ditches—Actions—Statutes.

Rights of Way—Ditches—Canals—Easements.

1. A right of way, and the right to a ditch, canal or other structure in which water is conveyed for irrigation or other lawful purposes, are easements over the land occupied by the ditch, canal, *etc.*

Easement—Definition.

2. An "easement" is an appurtenance to land, and constitutes an interest in real property.

[60 Mont. 510.]

Same—Quieting Title—Action lies.

3. *Held*, under section 6870, Revised Codes, as amended by Chapter 113, Laws of 1915, that an action lies to quiet title to an easement to a right of way for a ditch as against a county in exclusive use of the land for highway purposes. (MR. CHIEF JUSTICE BRANTLY dissenting.)

Appeals from District Court, Powell County; George B. Winston, Judge.

ACTION by C. N. Mannix against Powell County. From a judgment dismissing the complaint, and from an order denying a new trial, plaintiff appeals. Reversed and remanded.

Mr. S. P. Wilson and *Mr. H. W. Rodgers*, for Appellant, submitted a brief; *Mr. Wilson* argued the cause orally.

Citing: *Castro* v. *Barry*, 79 Cal. 443, 21 Pac. 946; *Kittle* v. *Bellegarde*, 86 Cal. 556, 25 Pac. 55.

Mr. Wellington D. Rankin, Attorney General, for Respondent, submitted a brief; *Mr. L. A. Foot*, Assistant Attorney General, argued the cause orally.

An action to quiet title is either for the purpose of removing a cloud on the title, that is, to remove or cancel some instrument of record that is affecting the title, or where there is a continued assertion of defeated title. There is no claim of any cloud upon the plaintiff's title; no claim of any instrument of record placed there or continued there by the defendant, which ought not to be there, or which ought now to be cancelled if originally put there rightfully. Equity will intervene in behalf of one who has successfully vindicated his title at law against another where the latter continues to harass the former by repeated assertions of his defeated title. (32 Cyc. 1307; *Whitehouse* v. *Jones*, 60 W. Va. 680, 12 L. R. A. (n. s.) 49, 55 S. E. 730; *Stark* v. *Starrs*, 6 Wall U. S. 402, 18 L. Ed. 925 [see. also, Rose's U. S. Notes].) There is nothing to show that the county commissioners in this case acted in other

than the utmost good faith, and without any intention of depriving the plaintiff of any property to which he was lawfully entitled, nor had they any intention of occupying with a county road any land to which, in their opinion, the county was not entitled by reason of its long established right of way.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The plaintiff claims to be the owner of two irrigating ditches and a right of way for each, between Avon and Helmville, in Powell county. The defendant county claims certain portions of each of the same ditches and rights of way, for public highway purposes, and in the improvement of its highway between the towns mentioned has occupied and is using the portions claimed by it. This action was instituted, and, after issues joined and a trial had, the district court dismissed the complaint and rendered judgment for defendant's costs. From the judgment, and from an order denying a new trial, plaintiff appealed.

The judgment recites that it is not upon the merits, but based upon the court's conclusion that this action cannot be maintained, and the correctness of that conclusion is the only question presented.

Plaintiff does not contend that he is the owner of the lands over which the disputed portions of the ditches and rights of way extend, but only that he is the owner of the ditches and the right of way for each. The right of way is an easement, [1] and nothing more (sec. 4507, Rev. Codes; 34 Cyc. 1767); and likewise the right to a ditch, canal, or other structure in which water is conveyed for irrigation or other lawful purposes, is merely an easement over the land occupied by the ditch, canal, *etc.* (1 Wiel on Water Rights, sec. 280; *McDonnell* v. *Huffine*, 44 Mont. 411, 120 Pac. 792; *Smith* v. *Denniff*, 24 Mont. 20, 81 Am. St. Rep. 408, 60 Pac. 398.) Reduced to its lowest terms, then, the question presented is this: Will

[2, 3] an action lie to quiet title to an easement as against a defendant in exclusive use of it?

Section 4515, Revised Codes, provides that the owner of a dominant estate may maintain an action for the enforcement of an easement attached thereto, but the character of the action is not indicated. Section 6870, as amended by Chapter 113, Laws of 1915, provides: "An action may be brought and prosecuted to final decree, judgment, or order, by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons, both known and unknown, who claim or may claim any right, title, estate, or interest therein, * * * adverse to plaintiff's ownership. * * * All actions brought under this section must be brought in the county in which the real estate or a portion thereof, as to which the title is sought to be quieted, is situated."

Like statutes have been enacted in many states, and they have been held generally to enlarge greatly the jurisdiction formerly exercised by courts of equity to quiet title or remove clouds. The purpose of such a statute is to afford an easy and expeditious mode of quieting title to real estate, and it is altogether immaterial that plaintiff is out of actual possession. (5 R. C. L. 643.)

The present action is brought under amended section 6870 above, and may be maintained if that section is sufficiently comprehensive to include an action to quiet title to an easement. What, then, is the character of the easement in question?

Section 4425, Revised Codes, declares that real property includes land and that which is incidental or appurtenant to land. An easement is an appurtenance to land (*Smith* v. *Denniff*, above) and constitutes an interest in real property under all the authorities (*Northern Pac. R. R. Co.* v. *Carland*, 5 Mont. 146, 3 Pac. 134). The plaintiff then claims title to

an interest in real property to which defendant asserts an adverse claim. Is that interest sufficient to bring the plaintiff within the meaning of amended section 6870? Clearly, the statute does not exclude everyone except the holder of a fee simple title. Like statutes have been construed by the courts frequently, and it is the prevailing opinion that under such a statute as ours the owner of any estate or interest in land of which the law takes cognizance is entitled to have any claim adverse to his interest, such as it is, determined, and the title quieted. (*German-American Sav. Bank* v. *Gollmer,* 155 Cal. 683, 24 L. R. A. (n. s.) 1066, 102 Pac. 932; 5 R. C. L. 646.) Under a statute substantially the same as our own above, the supreme court of Indiana held that an adverse claim to an easement may be determined and the title quieted. (*Davidson* v. *Nicholson,* 59 Ind. 411.) This court, without considering specifically the question now under review, has recognized the right of a claimant to an easement to maintain an action to quiet title under the statute above in two instances at least. (*Cottonwood Ditch Co.* v. *Thom,* 39 Mont. 115, 101 Pac. 825, 104 Pac. 281; *McDonnell* v. *Huffine,* above.) No decided case holding directly to the contrary has been called to our attention.

The difficulty of making the decree effective is suggested as a reason for denying the application of the statute to a case of this character; but with that feature we are not directly concerned upon this appeal. Whether it shall be enforced by a writ of restitution apparently authorized by section 6849, Revised Codes, and declared to be appropriate by the supreme court of California (*Landregan* v. *Peppin,* 94 Cal. 465, 29 Pac. 771), or by injunction, mandatory or prohibitory in character, as incidental to the principal relief sought (32 Cyc. 1381), we do not determine. The statute appears to be sufficiently broad to comprehend an action to quiet title to an easement, and, further, we are not called upon to go at this time.

The cause should be determined upon the merits, and to that

end the judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

ASSOCIATE JUSTICES REYNOLDS, COOPER and GALEN concur.

MR. CHIEF JUSTICE BRANTLY dissents.

Rehearing denied September 17, 1921.

STATE EX REL. BAIRD ET AL., RESPONDENTS, v. ANDERSON, JUSTICE OF THE PEACE, APPELLANT.

(No. 4,404.)

(Submitted June 7, 1921. Decided July 1, 1921.)

[199 Pac. 720.]

Certiorari—Justices' Courts—Satisfaction of Judgment—Subsequent Annulment Error.

1. Where a judgment rendered by a justice of the peace in an action on a promissory note and an open account had been satisfied by sale of personal property under execution, and thus ceased to exist, the district court, on *certiorari*, was without power to annul and set it aside as having been entered without jurisdiction.

Appeal from District Court, Yellowstone County; S. C. Spencer, Judge.

CERTIORARI by the State, on relation of Robert Baird and another, against Ray Anderson, Justice of the Peace of Billings Township, Yellowstone County, to review a judgment for plaintiff in an action by J. S. Haley against relators. Judgment for relators and respondent appeals. Reversed and remanded, with directions to set aside the judgment and dismiss the *certiorari* proceedings.

Mr. J. Henry Nibbe and *Mr. Geo. W. Pierson*, for Appellant, submitted a brief; *Mr. Pierson* argued the cause orally.

Mr. James L. Davis, for Respondents, submitted a brief; *Messrs. Waldo & Cunningham*, of Counsel; *Mr. Wm. B. Waldo* argued the cause orally.

MR. JUSTICE REYNOLDS delivered the opinion of the court.

One J. S. Haley brought his action before defendant, as justice of the peace, against relators, upon a certain promissory note and open account. The cause was brought on for trial February 21, 1918, and upon the 25th of that month judgment was entered in favor of plaintiff. On the twentieth day of March, 1918, relators caused writ of review to be issued out of the district court to which return was made by defendant on the next day. On the first day of March, 1918, execution was issued and sales of personal property were had upon the fifteenth and twenty-first days of that month, respectively. By reason of the execution sales, sufficient proceeds were realized to satisfy the judgment, and on March 21 the judgment was satisfied, and acknowledgment of such satisfaction entered upon the docket by the attorney for plaintiff, all of which appeared in defendant's return to the writ of review.

Respondents contend that the judgment was entered without jurisdiction for several reasons; but, in view of the fact that the case must be reversed on another ground, it will be unnecessary for us to consider these jurisdictional questions.

The facts of this case as to the satisfaction of the judgment [1] and issuance of writ of review are identical with those disclosed in the case of *State ex rel. Reynolds* v. *Laurendeau*, 27 Mont. 522, 71 Pac. 754. In that case this court held that the district court could not make and enter a judgment annulling and setting aside a judgment of the justice of the peace, which was not then in existence as shown by the record before it. The reason for the holding is apparent, for if the judgment has been satisfied, it has ceased to exist, there is nothing to review, and there is nothing in the record from which defendant needs any relief. If the judgment was entered without

jurisdiction, and therefore was void, it was void for all purposes, and a judicial declaration to that effect after its satisfaction on the record could serve no good purpose. Under the authority of that case we must hold that the district court erred in entering the judgment from which the appeal was taken.

The judgment is reversed and the cause remanded, with directions to the lower court to set aside the judgment made and entered on the fourth day of April, 1918, and dismiss the *certiorari* proceedings.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES COOPER, HOLLOWAY and GALEN concur.

LE MUNYON, RESPONDENT, *v.* GALLATIN VALLEY RAILWAY CO., APPELLANT.

(No. 4,425.)

(Submitted June 9, 1921. Decided July 1, 1921.)

[199 Pac. 915.]

Waters and Watercourses—Obstruction—Railroad Embankments—Surface Waters.

"Watercourse"—Definition.

1. A "watercourse" is a living stream with defined banks and channel, not necessarily running all the time, but fed from other and more permanent sources than mere surface water.

Waters and Watercourses—Surface Waters—Obstruction by Railroad Embankment—When Defendant not Liable for Damages.

2. Under the common-law rule of liability for the obstruction of surface waters, in force in this state in the absence of statute providing otherwise, defendant railway company was not liable for dam-

---

2. On right of owner of lower tenement as against the rights of the upper land owner to obstruct surface water in a natural drainage channel, see notes in 16 **Am. St. Rep.** 710; **Ann. Cas.** 1914A, 1292; 22 **L. R. A. (n. s.)** 789; **L. R. A.** 1917A, 517.

The question, What is surface water? is discussed in notes in 3 **Ann. Cas.** 208; 25 **L. R. A.** 527.

age caused to plaintiff's property by surface waters which were dammed up by its embankment and for the escape of which it had failed to construct culverts or openings, its duty in this respect being confined, by subdivision 5 of section 4275 and section 4362, Revised Codes, to providing outlets for streams, watercourses etc., intersected by the embankment, plaintiff's evidence having failed to establish that the invading waters were conveyed through a natural watercourse.

Appeals from District Court, Gallatin County; B. B. Law, Judge.

ACTION by Riley Le Munyon against the Gallatin Valley Railway Company. Judgment for plaintiff, and defendant appeals from the judgment and from the order denying its motion for a new trial. Reversed and remanded, with directions to dismiss the complaint.

Messrs. Keister & Bath, for Appellant, submitted a brief; *Messrs. Murphy & Whitlock,* of Counsel, submitted a supplemental brief; *Mr. A. N. Whitlock* argued the cause orally.

There is no responsibility for obstruction of the flow of surface waters. (40 Cyc. 463; *Jordan* v. *St. Paul, M. & M.*, 42 Minn. 172, 6 L. R. A. 573, 43 N. W. 849; *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 368, 37 L. Ed. 772, 13 Sup. Ct. Rep. 1914 [see, also, Rose's U. S. Notes]; *Kansas City & E. R. Co.* v. *Riley,* 33 Kan. 374, 6 Pac. 581; *Chicago, K. & N. Ry.* v. *Steck,* 51 Kan. 737, 33 Pac. 601; this case is exactly in point and sets out the facts almost to the letter with the facts testified to in this case; *Raleigh & A. A. L. R. Co.* v. *Wicker,* 74 N. C. 220; *Abbott* v. *Kansas City, St. J. C. B. R. Co.,* 83 Mo. 271, 53 Am. St. Rep. 581; *Cleveland C. C. & St. L. Ry. Co.* v. *Huddleston,* 21 Ind. App. 621, 69 Am. St. Rep. 385, 52 N. E. 1008; *Hanlin* v. *Chicago & N. W. Ry. Co.,* 61 Wis. 515, 21 N. W. 623; *Hannaher et al.* v. *St. Paul M. & M. R. Co.,* 5 Dak. 1, 37 N. W. 717; *Burke* v. *Missouri Pac. Ry. Co.,* 29 Mo. App. 370; *Walker* v. *New Mexico & S. Pac. Ry. Co.,* 165 U. S. 593, 41 L. Ed. 837, 17 Sup. Ct. Rep. 421; *Gibson* v. *Duncan,* 17 Ariz. 329, 152 Pac. 856; *Baltimore & O. R. R. Co.* v.

Thomas, 37 App. D. C. 256; *Howard* v. *City of Buffalo*, 211 N. Y. 258, 105 N. E. 430.)

This court in the case of *Fordham* v. *Northern Pac. Ry.*, 30 Mont. 421, 104 Am. St. Rep. 729, 66 L. R. A. 556, 76 Pac. 1040, laid down the rule for distinguishing between surface water and waters of a stream, but did not pass upon the question as to whether a railroad company was liable for interference with the flow of surface water.

Messrs. Carlson & Peterson, for Respondent, submitted a brief; *Mr. C. E. Carlson* argued the cause orally.

If this court is to adopt the restricted definition of watercourse laid down in the earlier decisions, that is, a channel with well-defined bed and banks, then the respondent has failed to establish a watercourse. If, on the other hand, this court is to adopt a mere liberal definition of a watercourse as placed upon it in a number of decisions cited below, then section 4275, Revised Codes, puts the case at rest. In the case of *Quinn* v. *Chicago, M. & St. P. R. Co.*, 23 S. D. 126, 22 L. R. A. (n. s.) 789, 120 N. W. 884, the court said: "While it did not appear from the evidence in the case at bar that there was a defined watercourse, having well-defined bed and banks, which is usually referred to as a 'watercourse,' in the authorities, still it was shown that there was a natural watercourse or ravine; and, although the watercourse was not one having well-defined bed and banks, it was one in which the surface waters from some forty or fifty acres of plaintiff's land found an outlet, and consequently such a channel comes within the rule that it cannot be negligently obstructed by a railroad company or natural person." (See, also, *Town* v. *Missouri P. R. Co.*, 50 Neb. 768, 70 N. W. 402; *Boyd* v. *Conklin*, 54 Mich. 583, 52 Am. St. Rep. 831, 20 N. W. 595; *Jungblum* v. *Minneapolis, N. U. & S. W. R. Co.*, 70 Minn. 157, 72 N. W. 971; *Norfolk & W. R. R. Co.* v. *Carter*, 91 Va. 587, 22 S. E. 517; *Earl* v. *De Hart*, 12 N. J. Eq. 280, 72 Am. Dec. 395; *Sinai* v. *Louisville, N. O. & T. R. Co.*, 71 Miss. 547, 14 South. 87;

Lambert v. *Alcorn*, 144 Ill. 313, 21 L. R. A. 611, 33 N. E. 53; *Ribordy* v. *Murray*, 177 Ill. 134, 52 N. E. 325; *Boyd* v. *Conklin*, 54 Mich. 583, 52 Am. Rep. 831, 20 N. W. 595.)

The appellant relies on section 3552, Revised Codes of 1907. While it is true that under the provision of the section referred to the common law has been adopted it is, nevertheless, in the instant case tempered by the golden maxim contained in section 6192, Revised Codes of 1907: "One must so use his own rights as not to infringe upon the rights of another." In reference to this matter the supreme court of Iowa (*Traetter* v. *Chicago, G. W. Ry. Co.*, 147 Iowa, 375, 140 Am. St. Rep. 304, 126 N. W. 341), held that a railway company in filling the passageway beneath the bridge and where surface water was wont to flow in the usual and natural way, according to the lay of the land, owed the plaintiff the duty not to unnecessarily dam up and throw back said water, to the injury of neighboring land owners, but was bound to exercise ordinary care in what it did, so as not to occasion unnecessary inconvenience and damage to such owners. That if a watercourse has been established, then the law has been superseded by section 4275, Revised Codes. If the case is not covered by this section, then the common law is not only affected by section 6182, but the defendant has violated the provisions of section 4362. Under the provisions of this section it is the duty of the railway company within three months after the completion of its road to cause to be constructed and maintained suitable ditches and drains along each side of its roadbed or to construct culverts or openings through such roadbed to connect with ditches or drains or watercourses so as to afford sufficient outlet to drain and carry off the water along such railroad, whenever the draining of such water has been obstructed. The complaint clearly charges a violation of this statute.

For the sake of argument, let us concede for a moment that none of the sections referred to, specific as they are in their terms, have any applicability to the case. Should the court find this to be the case in passing upon this question for the

first time, unhampered by any former decisions, there is still no reason why this court should not hold a railway company liable for the obstruction of surface waters flowing in swales, depressions or ravines. California has a section identical to our section 3552. The supreme court of California has passed upon the question repeatedly. In *Wood* v. *Moulton,* 146 Cal. 317, 80 Pac. 92, it uses the following language: "Appellants' principal contention is that, under the statutes of this state (Stats. 1850, p. 219) and under section 4468 of the Political Code, as the common law of England is made the rule of decision in this state where not repugnant to or inconsistent with our Constitution or laws, the defendants' acts in ridding themselves of this stormwater were entirely consistent with their rights, and if plaintiff suffered damage therefrom, it was *damnum absque injuria.* Such, indeed, was the rule at common law, but, by a long course of decisions in this state consistently adhered to, the rule of the civil law has been adopted and has become our rule of property." (Citing a large number of cases.) This same language was approved in *Board of Trustees* v. *Rodley,* 38 Cal. App. 563, 177 Pac. 175. On the authority of *Wood* v. *Moulton, supra,* in which the court dealt with an almost identical situation and passed upon an identical law, there is no reason why this court should not hold that the liability attaches in the instant case. (See, also, *Cushing* v. *Pires,* 124 Cal. 663, 57 Pac. 572; *Shaw* v. *Sebastopol,* 159 Cal. 623, 115 Pac. 213; *Skinner* v. *Great Northern Ry. Co.,* 129 Minn. 113, 151 N. W. 968; *Lincoln & B. H. R. Co.* v. *Sutherland,* 44 Neb. 526, 62 N. W. 859; *City of Beatrice* v. *Leary,* 45 Neb. 149, 50 Am. St. Rep. 546, 63 N. W. 370; *Quinn* v. *Chicago M. & St. P. R. Co.,* 23 S. D. 126, 22 L. R. A. (n. s.) 789, 120 N. W. 884; note in 40 Cyc. 644.)

MR. COMMISSIONER SPENCER prepared the opinion for the court.

The defendant owns, operates and maintains a railway line from Three Forks to Bozeman, Montana, through the town of

Manhattan. The plaintiff owns 18.46 acres of land situated near Manhattan and a short distance south and west of defendant's railroad. The complaint alleges that "across said piece of land are certain natural watercourses which drain the land belonging to this plaintiff, and other lands surrounding the land of said plaintiff," and further alleges that these natural watercourses drain across the right of way of this defendant. Plaintiff has a house upon his land in the basement of which was a large quantity of personal property during the years. 1916 and 1917. The defendant is charged with negligence in the reckless and careless construction and maintenance of a high embankment as a roadbed across the natural watercourses upon plaintiff's and adjoining lands, without culverts or openings for the escape of the waters flowing therein, as a result of which these waters, in the spring of 1916 and 1917, were dammed up and caused to overflow plaintiff's land, to the damage of his land, house and personal property therein in the sum of $5,000. The answer puts in issue all of the material allegations of the complaint except the ownership and operation of the railroad by defendant and the ownership of the lands of the plaintiff, and alleges affirmatively that, if any damage was done to the property of the plaintiff as charged, it arose by reason of a county highway built by Gallatin county between the land of the plaintiff and the right of way of defendant. Trial was to a jury. Plaintiff prevailed. Judgment was made and entered accordingly and motion for a new trial denied. Appeal is from both the judgment and order denying the motion.

Although appellant has specified thirteen assignments of error, it only becomes necessary in the disposition of these appeals for this court to adopt a rule of liability for the obstruction of surface waters. In *Fordham* v. *Northern Pac. Ry. Co.*, 30 Mont. 421, 104 Am. St. Rep. 729, 66 L. R. A. 556, 76 Pac. 1040, this court has succinctly laid down the rule to determine the character of water.

That the property of the respondent has been damaged by [1] water overflowing his land is no less a certainty than that

the water which caused the damage is properly designated as "surface water," nor, under the evidence, is there opportunity for discussion as to whether or not the invading waters were conveyed through natural watercourses, for the plaintiff testified that what he termed "watercourses" were "slight depressions," "draws," or "swales."

Anderson's Dictionary of Law defines a watercourse as follows: "A living stream with defined banks and channel, not necessarily running all the time, but fed from other and more permanent sources than mere surface water." This definition has our approval, and the evidence in the instant case discloses none of the elements required to constitute a watercourse.

There are two rules by which liability for the obstruction [2] of surface waters is measured—one known as the rule of the civil law, the other the rule of the common law. Under the former, the lower premises are subservient to the higher, and the latter has a qualified easement with respect to the former, which gives the right to discharge all surface water upon them. The common-law doctrine is the reverse. The lower land owner owes no duty to the upper land owner; each may appropriate all the surface water which falls upon his premises, and the one is under no obligation to receive from the other the flow of any surface water, but may in the ordinary prosecution of his business and the improvement of his premises, by embankments or otherwise, prevent any portion of the surface water coming from such upper premises. (*Walker* v. *New Mexico & S. P. R. Co.*, 165 U. S. 593, 41 L. Ed. 837, 17 Sup. Ct. Rep. 421.) Under the common law, surface water is the enemy of all mankind, and each land owner has the right to protect his own land therefrom. (*Campbell* v. *Flannery*, 29 Mont. 246, 252, 74 Pac. 450.)

Section 3552, Revised Codes, provides: "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this state, or of the Codes, is the rule of decision in all the courts of this state." Hence the jurisprudence of

this state is governed by the rules of the common law unless the statutes determine otherwise.

The respondent urges subdivision 5 of section 4275, and section 4362, Revised Codes, as determinative of defendant's liability. Subdivision 5 of section 4275, is as follows: "Every railroad corporation has power: * * * To construct their road across, along, or upon any stream of water, watercourse, roadstead, bay, navigable stream, street, avenue, or highway, or across any railway, canal, ditch or flume, which the route of its road intersects, crosses or runs along, in such manner as to afford security for life and property; but the corporation shall restore the stream or watercourse, road, street, avenue, highway, railroad, canal, ditch or flume thus intersected to its former state of usefulness, as near as may be, or so that the railroad shall not unnecessarily impair its usefulness or injure its franchise."

Section 4362, Revised Codes, is as follows: "It shall be the duty of every corporation, company, or person owning or operating any railroad, or branch thereof, in this state, and of any corporation, company, or person constructing any railroad in this state, within three months after the completion of the same through any county in this state, to cause to be constructed and maintained suitable ditches and drains along each side of the roadbed of such road or to construct culverts or openings through such roadbed to connect with ditches or drains, or watercourses, so as to afford sufficient outlet to drain and carry off the water along such railroad whenever the draining of such water has been obstructed or rendered necessary by the construction of such railroad; provided that none of the drains or ditches herein referred to shall be required to be constructed by any of the persons or corporations herein named or described, except when required to remove and drain off water accumulated upon property adjacent to or upon the right of way whose natural channel or outlet has been destroyed or impaired by the embankment of such railway so constructed as aforesaid. * * * "

The former section does not settle the liability of defendant herein, because the evidence of the plaintiff negatives the existence of a watercourse, and, without the existence of a watercourse, this section is wholly inapplicable to the facts in this case, and liability must be fixed by the rule of the common law; and section 4275, *supra*, has not modified that rule.

Section 4362, Revised Codes, quoted above and urged by respondent, is not in conflict with section 4275, *supra*, nor does it in any sense alter the common-law rule herein set forth. That portion of section 4362, *supra*, included within the exception or proviso, which mentions "natural channel" or "outlet" refers back to the first or main body of the section, fixing the requirements of railroad corporations as to ditches, drains, and watercourses, and means "ditches," "drains," or "watercourses" as therein expressed, and hence the provisions of this section likewise afford no relief to the respondent.

We therefore conclude that, the plaintiff having failed to establish the existence of any watercourses as alleged in his complaint, and the trespassing waters being vagrant in their nature, or surface water, the defendant owed no obligation to the plaintiff in the protection of the latter from the encroachment of such waters. The court erred in refusing to give defendant's offered instruction No. 1–A as set forth in the sixth specification of error. Other assignments of error, we think, are meritorious, but, as the complaint herein must be dismissed, further discussion is unnecessary.

For the reasons given in the foregoing opinion, we recommend that the judgment and order appealed from be reversed and the cause remanded to the district court of Gallatin county, with directions to dismiss the complaint.

PER CURIAM: For the reasons given in the foregoing opinion, it is ordered that the judgment and order appealed from be reversed and the cause remanded to the district court of Gallatin county, with directions to dismiss the complaint.

Reversed.

IN RE FRATT'S ESTATE. ARNOLD ET AL., EXECUTORS, RESPONDENTS, *v.* MORRISSEY ET AL., APPELLANTS.

(No. 4,420.)

(Submitted June 8, 1921. Decided July 1, 1921.)

[199 Pac. 711.]

Estates of Deceased Persons—Executors and Administrators—Partial Distribution—Lapsed Legacies—Trusts—Income—Interest—Inheritance Taxes.

Executors and Administrators—May not Petition for Partial Distribution.

1. While an executor (or administrator) may resist an application for partial distribution, in the absence of statute permitting him to petition for such distribution, he has no right to do so, the right to so petition being only conferred upon heirs, devisees and legatees by sections 7664 and 7669, Revised Codes, and the court was therefore without jurisdiction to entertain his petition.

Wills—"Devise"—"Bequest"—Definition.

2. A "devise" is a gift of real property, and a "bequest" a gift of personal property, by will.

Same—Lapsed Legacies Pass as Interstate Property.

3. *Held*, under section 4789, Revised Codes, that legacies to one who died before the testatrix, lapsed upon the latter's death, and were distributable to her heirs under the laws governing intestacy.

Same—Devises—Death of Devisee Before Death of Testator—Effect.

4. The word "devised' used in section 4758, Revised Codes, providing that if any estate is *devised* to any relative of the testator, and the devisee dies before the testator, leaving lineal descendants, they take the estate so given in the same manner the devisee would have done had he survived testator, *held* to mean a gift of real property by will, and not a gift of personal property.

Same—Trusts—When Beneficiary not Entitled to Interest or Income.

5. Where a will bequeathed $50,000 in trust to the niece of testatrix and devised to her also in trust certain city lots and $150,000 to be used for the erection of a business block thereon, she to receive the income from the building, the will providing that none of the bequests should bear interest, she was not entitled to any interest on the $50,000 until it was invested, and not to any income with

---

3. Effect of restrictive words or reference to specific property in residuary clause to limit scope of clause as regards lapsed or ineffectual legacies and devises, see note in 10 A. L. R. 1522.

On devolution of lapsed legacy or devise where will contains residuary clause, see notes in Ann. Cas. 1914C, 812; 44 L. R. A. (n. s.) 789.

4. Distinction between lapsed legacy anl lapsed devise with respect to devolution, see note in Ann. Cas. 1914D, 719.

Time for taxing future estates under succession tax acts, see notes in 5 Ann. Cas. 237; Ann. Cas. 1916D, 309.

[60 Mont. 526.]

respect to the $150,000 until the building was erected and rentals received.

Estates of Deceased Persons—Partial Distribution—When Proper.

6. Where, on a petition for partial distribution, it was shown that there were no debts, that due notice to creditors of the estate had been given, that the time during which claims should be filed or presented had expired, and that the estate had funds and securities amply sufficient to cover a bequest to a niece in trust and the amount necessary to erect a building which the trustees were directed to construct on lots given her in trust, the lots, the amount of the bequest, and the amount needed to erect the building should have been set aside to the trustee, under section 7669, Revised Codes.

Same—Inheritance Tax—Life Estates—Remainder not Taxable, When.

7. Since inheritance taxes are not imposed upon the property which passes by will or succession, but upon the privilege of so taking, and a person cannot be taxed for more than he receives, where property was left to a niece for life, the remainder to go to her lineal descendants if she left any, and, if not, to others named, thus leaving it indeterminable in whom or when the remainder of the estate would vest, the remainder interests were not taxable to her, and she was only liable for the tax based on the value of her life estate.

Appeal from District Court, Yellowstone County; A. C. Spencer, Judge.

PROCEEDING by J. B. Arnold and another, executors, for partial distribution of the estate of Kate Fratt, deceased. From an order granting insufficient relief, Marguerite Morrissey and another appeal. Modified.

Cause submitted on briefs of Counsel.

Mr. Geo. W. Pierson, for Appellants.

The bequests made Annie Morrissey did not lapse. The will is silent as to disposition of bequests in event the beneficiary died before the testator, and the statute is appealed to in aid of the dispositions made. "When any estate is devised to any child, or other relation of the testator, and the devisee dies before the testator, leaving lineal descendants, such descendants take the estate so given by the will, in the same manner as the devisee would have done had he survived the testator." (Rev.

---

7. Method of determining value of interest of life beneficiary under inheritance tax laws, see note in Ann. Cas. 1914D, 77.

[60 Mont. 526.]

Codes, sec. 4758.) When the language of this section is considered in connection with the other provisions of the Codes, it includes personal property as well as real property. The terms "estate given by the will" employed in the section are not limited to real property. The testatrix did not provide that in the event of the death of the beneficiary, the portion willed such person should go to the residuary legatees.

In the construction of a will, the intention of the testator, as expressed, must prevail, and should control, if consistent with legal principles. (*Dean* v. *Crews*, 77 Fla. 319, 81 South. 479; *Gates* v. *Fisher*, 107 Misc. Rep. 53, 175 N. Y. Supp. 423.) "The purpose of the statutes to prevent lapses of a legacy or devise is not to defeat the will and intention of the testator, but to supplement and aid it." (Alexander on Wills, sec. 753.)

In our Codes the terms "devise" and "devisee," "legacy and legatee," are frequently coupled, but in no instance are any of the terms used singly for the purpose of conveying a distinctive meaning of one from the other. The word "devise" may technically apply to a gift of real property, but not always. It is frequently used in the same sense as "bequeath," both in statutes and in wills. (*Logan* v. *Logan*, 11 Colo. 44, 17 Pac. 99; *Kibler* v. *Huver*, 57 Hun, 14, 10 N. Y. Supp. 375; *Roundtree* v. *Pursell*, 11 Ind. App. 522, 39 N. E. 747, 749; *Evans* v. *Price*, 118 Ill. 593, 8 N. E. 854; *Rumel* v. *Solomon*, 54 Utah, 25, 180 Pac. 419.) "The statutes are to be construed with reference to the objects to be accomplished by them, and where a particular construction would lead to unreasonable results, a different construction is to be given, if it can be done without doing violence to the letter of the statute." (*Logan* v. *Logan*, 11 Colo. 44, 17 Pac. 101.)

The supreme court of California in construing section 1310, Civil Code, held the section did not include personal property. We respectfully submit in doing so the court not only violated well-recognized rules of construction, but successfully rebutted its reasoning by the significant remark, "It is strange that the legislature should have limited the application of section 1310

to devises alone." (*In re Ross' Estate,* 140 Cal. 282, 73 Pac. 976; *In re Lewis' Estate,* 39 Nev. 445, 4 L. R. A. 241, 159 Pac. 961.) The reasoning of the above cases of California and Nevada forces the conclusion that when a testator uses the term "devise" in his will, he may understand it includes personal property as well as real, but when he consults the statute to determine the force and effect of his will he must understand the term "devise" excludes the idea of personal property. Certainly this ought not to be.

If the one-sixth of the residue willed Annie Morrissey lapsed as to the personal property, then such portion does not go to the remaining beneficiaries, but goes to the heirs at law of the testatrix, and appellant is entitled to one-half. (Alexander on Wills, sec. 764; *In re Gorgas Estate,* 166 Pa. St. 269, 31 Atl. 86; *Church* v. *Church,* 15 R. I. 138, 23 Atl. 306; *Powers* v. *Godwise,* 172 Mass. 425, 52 N. E. 525; *Best* v. *Berry,* 189 Mass. 510, 109 Am. St. Rep. 651, 75 N. E. 743.)

There is no express provision in the will that the income of the sums on which Marguerite Morrissey is given the income shall go to any other person, and it would necessarily follow that the income passes to her inasmuch as it is not required for the payment of debts or expenses of administration. General legacies, when due, become a claim against the estate without an order of court providing for distribution, and they bear interest from the date they are due, and such interest is likewise a claim against the estate. (*Wormouth* v. *Gardner,* 112 Cal. 506, 44 Pac. 806.) The following authorities also sustain the rule that the income given dates from the death of the testator: (*Jesseph* v. *Westerberg,* 94 Wash. 602, 162 Pac. 1004; *Holiday* v. *Price,* 146 Ga. 782, 92 S. E. 533; *In re Franklin Trust,* 95 Misc. Rep. 71, 160 N. Y. Supp. 221; *Rachels* v. *Wimbish,* 31 Ga. 214; *Lawrence* v. *Littlefield,* 147 N. Y. Supp. 760; *In re Stanfield,* 135 N. Y. 292, 31 N. E. 1013; *Bank of Niagara* v. *Talbot,* 110 App. Div. 519, 96 N. Y. Supp. 976; *In re Flickwir's Estate,* 136 Pa. St. 374, 20 Atl. 518.)

[60 Mont. 526.]

In the absence of a clear direction to the contrary in the will, the beneficiaries have the same interest in the income, rents and profits of the property given to them as they have in the property itself. (40 Cyc. 1487.)

Under section 7724 of the Revised Codes the inheritance tax is computed upon the property passed by will or the intestate laws; where the title transferred is absolute the tax is computable on the principal, but when the will or conveyance only transfers a limited interest or an income therefrom, the tax is computed upon the value of such interest or income. The tax is not a levy upon the property, but on the right to take. (*Gelsthorpe* v. *Furnell*, 20 Mont. 299, 39 L. R. A. 170, 51 Pac. 267.) It necessarily follows that such tax is a personal obligation of the beneficiary to be computed on what the beneficiary in being is certain to receive. This idea is carried throughout the provisions of the statute, and is particularly manifested by the language used in sections 7725, 7729 and 7743, Revised Codes.

Under the terms of paragraph 11 of the will Marguerite Morrissey is given a life estate and the persons in whom the remainder may eventually vest are uncertain and are not in existence, and therefore the principal estate or remainder at this time has not vested, and there is no one in being against whom a claim for taxes upon the remainder could be made. The tax collectible at this time is upon the value of the life estate. (*In re Howell's Estate*, 69 N. Y. Supp. 1016; *Howe* v. *Howe*, 55 L. R. A. 626, 61 N. E. 225.)

Messrs. Johnston, Coleman & Johnston, for Respondents.

"A lapse most frequently occurs by reason of the death of the beneficiary before that of testator. At common law it was well settled that, in such a case as this, the devise or legacy lapsed." (Page on Wills, sec. 739; Jarman on Wills, Chap. 11; 40 Cyc., sec. 1508.)

Gifts to Annie Morrissey lapsed in so far as they apply to personal property. (*In re Ross' Estate*, 140 Cal. 282, 73 Pac.

976; *Estate of Claus Spreckels,* 5 Cof. Prob. Dec. 348; *In re Lewis' Estate,* 39 Nev. 445, 4 A. L. R. 241, 159 Pac. 961.)

Inasmuch as a certain sum is bequeathed to the trustee to pay the income to Miss Morrissey, and inasmuch as the executors are given a stated time in which to pay this bequest to the trustee and inasmuch as the will of Mrs. Fratt expressly declares that no bequest shall bear interest, Miss Morrissey does not become entitled to the payment of any income or interest until the same has actually been earned by the funds in the possession of the trustee. (*In re Brown's Estate,* 143 Cal. 450, 77 Pac. 160; *Paul* v. *Williams,* 59 Hun, 625, 13 N. Y. Supp. 701; affirmed in 136 N. Y. 644, 32 N. E. 1015; *Hawaiian Trust Co.* v. *Von Holt,* 216 U. S. 367, 54 L. Ed. 519, 30 Sup. Ct. Rep. 303 [see, also, Rose's U. S. Notes]; *Deal* v. *Schlomberg,* 20 Nev. 330, 22 Pac. 155.)

So far as we have been able to find, this court has never construed the inheritance tax law of this state as applied to a situation similar to that involved in the case at bar. Here all that is to be transferred to the appellant, Marguerite Morrissey, is the income from certain funds. The *corpus* of the legacies may eventually pass to her or her heirs, and it may not. Our inheritance tax statute is apparently very similar to, if not identical with, the former statutes of New York, and the courts of that state have passed upon the questions here involved many times. In addition to the cases cited by appellant, we would call the court's attention to *In re Hoyt,* 37 Misc. Rep. 720, 76 N. Y. Supp. 504, and *In re Howells' Estate,* 34 Misc. Rep. 432, 69 N. Y. Supp. 1016. Under these cases we are inclined to the same opinion as expressed in the brief of counsel for appellant that, at this time, the value of the legacies of income to Marguerite Morrissey should be appraised and inheritance tax paid upon the present values of such estates, and that the tax upon the subsequent estates in the trust fund bequeathed to the Merchants' National Bank can only be collected when such estates vest.

MR. COMMISSIONER JACKSON prepared the opinion for the court.

Appeal from an order directing partial distribution. The decedent disposed of her property by will, and among the beneficiaries thereunder were a sister, Annie Morrissey, and a niece, Marguerite Morrissey, daughter of Annie Morrissey, her only lineal descendant. The will gave to Annie Morrissey the sum of $15,000 and one-sixth of the residuary estate in equal shares with five others. Marguerite Morrissey's interest in the estate is shown by paragraphs 10 and 11 of the will, as follows:

"10. I give and bequeath to my said niece, Marguerite Morrissey, the sum of fifty thousand dollars, to be held in trust by the Merchants' National Bank of Billings, Montana, if said bank at the time this will is probated, or when requested to act as such trustee under this will, has then a trust department organized, officered, and equipped as required by the laws of the United States governing trust departments of national banks. Should said bank not have such trust department, then said sum is to be held in trust by my executors hereinafter named, or such other trustee as the court probating this will may appoint. Said sum of fifty thousand dollars is to be invested by said trustee subject to the approval of said court, and the income derived therefrom shall be paid to my said niece. When she reaches the age of thirty years, fifteen thousand dollars of said bequest is to be paid to her. At the age of thirty-five years, ten thousand dollars additional is to be paid to her out of said bequest. At the age of forty years, ten thousand dollars additional is to be paid to her out of said bequest. And the balance of said fifty thousand dollars is to be paid my said niece by said trustee when she reaches the age of forty-five years.

"11. I give, devise and bequeath to my said niece, Marguerite Morrissey, a life estate in and to lots numbered twenty-one, twenty-two, twenty-three, and twenty-four in block numbered fifty-seven of the original town, now city of Billings, in Yellow-

stone county, Montana, according to the official plat thereof on file and of record in the office of the county clerk and recorder of Yellowstone county, Montana, together with the tenements, hereditaments and appurtenances thereunto belonging and in and to not less than one hundred thousand dollars, or more than one hundred fifty thousand dollars, to be used in building a business block on said lots. Said lots and said money are to be held in trust for my said niece during her life time by the aforesaid trustee, which trustee shall contract for and cause to be erected a suitable business block on said lots, to cost not less than one hundred thousand dollars nor more than one hundred fifty thousand dollars, and the said trustee shall, after said building is erected, collect the rents therefrom and pay the net income therefrom to my said niece, so long as she shall live. Upon her death, said lots and building shall become the property of her children or their lineal descendants, if any. Should my said niece die without leaving any children or other lineal descendants, said lot and building shall then become the property of the children of my said brother, B. M. Sheehan, if any. In case of the death of any child of my said brother during the life estate of my said niece in said property, the share of said child in said property shall go to the lineal descendants, if any of such child. Said business block shall be known as and called 'Fratt Block.'

"In case my said niece and brother die without leaving any children or lineal descendants, then said lots and business block shall become the joint property of the corporation owning St. Vincent's Hospital at Billings, Montana, and the corporation owning the Kate Fratt Parochial School, hereinafter mentioned. The net income from said lots and building is to be divided equally between said hospital and school from time to time as the same is collected and accumulates, and shall be used by such corporations solely for that purpose, and not for the support or maintenance of any other properties which may be owned by either or both of such corporations."

[60 Mont. 526.]

Paragraph 20 of the will contains the following: "20. No property belonging to my estate shall be sacrificed in order to obtain the necessary money to pay any of the aforesaid bequests. My executors hereinafter named shall have five years, if necessary, within which to pay any and all of the aforesaid bequests. None of said bequests shall bear interest."

Annie Morrissey died prior to the death of the testatrix. During the course of administration the executors filed their petition, praying for an order directing partial distribution of the estate and asking the direction of the court with reference to the payment of interest, the legacy of Annie Morrissey, and as to whether or not the inheritance tax against the bequest in paragraph 11 of the will was to be paid out of the bequest or out of the residuary estate, and what sum of money should be paid by the executors to the trustee under paragraph 11 of the will. A petition for partial distribution was also filed by Marguerite Morrissey and the Merchants' National Bank of Billings, praying for an order that Marguerite Morrissey be entitled to receive and have distributed to her the sum of $15,000 bequeathed by the will to her mother, Annie Morrissey, and, as time and conditions permitted, that she have distributed to her the one-sixth of the remainder devised and bequeathed to Annie Morrissey; that Marguerite Morrissey and the Merchants' National Bank be entitled to, and have distributed to them, the sum of $200,000, together with the earnings and interest collected and received since the date of the death of the testatrix, January 1, 1918, on the sum of $200,000; that the real property mentioned in paragraph 11 of the will be set over and distributed to the petitioners.

A hearing was had on the petitions by the court without a [1] jury, at which oral evidence was produced. Under our statute the court should not have entertained the petition of the executors. Sections 7664 and 7669, Revised Codes, both provide that it is any heir, devisee or legatee who may present his or her petition, and, while the executor or administrator may appear and resist the application, nowhere is he given the

right to petition for partial distribution. This point is well settled under California statutes identical with ours. (*Estate of Letellier,* 74 Cal. 311, 312, 15 Pac. 847; *Alcorn* v. *Buschke,* 133 Cal. 655, 66 Pac. 15; *Estate of Young,* 149 Cal. 173, 85 Pac. 145.) The superior court in probate has no jurisdiction to entertain a proceeding for partial distribution on the petition of an administrator. A decree so rendered is void, as the statute authorizes the proceeding on the petition of an heir, devisee, or legatee only. (*Alcorn* v. *Gieseke,* 158 Cal. 396, 111 Pac. 98.) Therefore there was nothing before the court at the hearing but the petition of Marguerite Morrissey and the Merchants' National Bank and the oral testimony of two witnesses. Thereafter the court made findings of fact and conclusions of law, and they will be considered as having been made on matters that were properly before the court. The findings of fact, briefly, were:

That Annie Morrissey, a sister of Kate Fratt, was a beneficiary under her will, and that she died prior to the death of Kate Fratt, leaving Marguerite Morrissey, likewise a beneficiary under the will, as her sole surviving lineal descendant; that the Merchants' National Bank of Billings, Montana, was qualified under the provisions of the will, and had consented to act as trustee for the funds and property designated in the will; that notice to creditors had been duly given, and time for presentation of claim had expired; that all debts had been paid and the estate was ready for partial distribution; that certain devises and bequests were made in trust; and that the will provided none of the bequests should bear interest. Based upon the foregoing findings of fact, conclusions of law were given substantially as follows: That the executors should pay no interest upon the trust legacies from the date of the death of decedent; that the bequests and legacies in the will to Annie Morrissey lapsed by reason of her death prior to the death of the testatrix, but that the devise of her interest in the real estate did not lapse; that the executors should pay to the Merchants' National Bank, trustee, the sum of $150,000 as the

will provided; and that the inheritance tax against the bequest mentioned in paragraph 11 of the will should be paid out of the bequest itself and not from the residuary estate.

Marguerite Morrissey and the Merchants' National Bank excepted to the findings of fact and conclusions of law and moved the court to make additional findings and conclusions, which motion was denied, and the court made its order of partial distribution, in part as follows: " * * * It is ordered that no interest should be paid by said executors upon any legacy under said will, and in particular that no interest should be paid on the legacies mentioned in paragraphs 7, 10, 11, 12 and 15 of said will [legacies in trust]; that the bequests and legacies mentioned in said will to Annie Morrissey lapsed by reason of her death prior to the death of Kate Fratt, and the one-sixth interest, mentioned in paragraph 19 [residuary estate] of said will, bequeathed to the said Annie Morrissey, deceased, lapsed by reason of her death prior to the death of Kate Fratt, deceased, in so far as the same applies to the personal property belonging to said estate, but not as to any interest in real estate devised to her by paragraph 19 of said will; that any such interest in real estate devised to her by the terms of paragraph 19 of said will is to be distributed to her daughter, Marguerite Morrissey; that the sum of $150,000 should be paid by said executors to said Merchants' National Bank of Billings, as trustee, under the provisions of paragraph 11 of said will, less the inheritance tax thereon; that each bequest, legacy, and devise, including said bequest of $150,000, shall pay its share of the state inheritance tax under the laws of Montana, instead of the whole of said inheritance tax being paid out of the residuary estate."

Five assignments of error are made, and they will be considered in order.

The contention is made that Marguerite Morrissey should succeed to the rights of her mother, Annie Morrissey, in the legacy of $15,000 bequeathed her by the will. To sustain this viewpoint necessitates doing violence to the clear, distinct,

[2] legal, and accepted definition of the words "devise" and "bequest." Bouvier defines "devise" as "a gift of real property by a last will and testament," and "bequest" as "a gift by will of personal property."

Undoubtedly the legislature, in framing our statutes, used [3, 4] both these words in their correct and approved legal and technical sense. A clear-cut distinction is apparent in the mere reading of sections 4758 and 4789, Revised Codes, cited by appellant. In the sections with reference to testamentary disposition of real property, *viz.*, sections 4759, 4760, 4777, 4787, 4790, 4796, 4801, and 4804, the words "devise" and "bequeath" are both used. Sections 4778 and 4779 show unerringly the intent of the legislature and its careful discrimination in the use of the appropriate words.

"Words and phrases are construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, are to be construed according to such peculiar or appropriate meaning or definition." (Sec. 8070, Rev. Codes.)

Under California statutes formerly identical with ours and under those of Nevada on this question, the courts held to the distinction and technical meaning. (*In re Ross' Estate,* 140 Cal. 282, 73 Pac. 976; *Estate of Spreckels,* 5 Cof. Prob. Dec. 348; *In re Lewis' Estate,* 39 Nev. 445, 4 A. L. R. 241, 159 Pac. 961.)

Accordingly the legacy of $15,000 and any residuary legacy to Annie Morrissey lapsed upon her death, and the bequests reverted to the estate of Kate Fratt, deceased. As to these legacies, decedent died intestate, and they must be distributed to her heirs under the laws governing intestacy.

With respect to the real estate, if there be any, contained in the residuary estate, Marguerite Morrissey succeeds to the interest of her mother. (Sec. 4758, Rev. Codes.)

The second assignment has been covered by what has already been said concerning the disposition of the entire interest in the estate had by Annie Morrissey.

[60 Mont. 526.]

Complaint is made that the order for partial distribution [5] deprives Marguerite Morrissey of the income given her under the terms of the will from the date of the death of the testatrix upon the sums of $50,000 and $150,000, respectively. Under paragraph 20 of the will, it is distinctly stated that "none of the said bequests shall bear interest."

The oral testimony at the hearing showed that the property of Mrs. Fratt at the time of her death consisted of notes, real estate and securities of different kinds. There were no funds set apart to place in the hands of the executors to carry out the bequests, and the trustee agreed to accept in partial payment of the trust funds under the will certain securities at a valuation of $195,115.28, in lieu of cash, so that partial distribution might be made.

The bequests to Marguerite Morrissey were neither simple bequests of income nor of income from specific property belonging to the estate. The incomes were those that would be derived from the investment of funds, subject to the approval of the court and from a building to be erected on certain property by the trustee.

Under the plain and unmistakable provisions of this will, no interest could be paid on the bequests, and Marguerite Morrissey is not entitled to any income or interest with respect to the sum of $50,000 until it is invested by the trustee and earnings accrued, and with respect to the building until it had been erected and an income derived therefrom.

We quote from *In re Brown's Estate*, 143 Cal. 450, 77 Pac. 160, decided under statutes identical with ours, and cited by respondents: "The appellant cites, in support of her claim to payment from date of death, section 1366 of the Civil Code, as follows: 'In case of a bequest of the interest or income of a certain sum or fund, the income accrues from the testator's death.' If this section was applicable, of course the appellant would be entitled to the monthly payments from the time of the death of the testatrix. But the bequest in this case was not of the interest or income of a certain sum to be paid by the

executors of the estate. The testatrix bequeathed the sum of $5,000 to certain trustees, and the monthly income was to be paid by the trustees, and not by the executors. Necessarily the trustees could not begin payment until they received the fund and invested it so as to produce an income. The intention of the testatrix must therefore have been that payments were not to begin until the fund from which it was to be produced was distributed to the trustees, who were to make the payments. The distinction is thus stated: 'Where he absolutely gives the beneficiary a given income, and merely indicates in his will the source from which it is to be obtained, the general rule is that the income in such case is to be estimated from the death of the testator. * * * But, where the bequest is only of the income to be obtained from a certain specified fund, * * * it is held that the beneficiary can receive only the actual income when received from such fund.' (Page on Wills, sec. 601.) A gift of an income from a certain fund is not an annuity, and interest does not begin thereon until one year from the death of the deceased. * * * As to the claim that she is entitled to interest on the $5,000 bequeathed to the trustee, we think that that is covered by the provision in the will that the executor should not be charged with interest upon any bequest therein made." (See, also, *Paul* v. *Williams*, 59 Hun, 625, 13 N. Y. Supp. 701; *Id.*, 136 N. Y. 644, 32 N. E. 1015; *Hawaiian Trust Co.* v. *Von Holt*, 216 U. S. 367, 54 L. Ed. 519, 30 Sup. Ct. Rep. 303; *Deal* v. *Schlomberg*, 20 Nev. 330, 22 Pac. 155.)

It is next claimed that the appellant's rights were prejudiced [6] by the court in failing to set aside the lots in which Marguerite Morrissey was given a life estate. Section 7669, Revised Codes, reads in part: "If at the hearing it appear that the estate is but little indebted, and that the share of the party applying may be allowed to him without loss to the creditors of the estate, the court or judge must make an order in conformity with the prayer of the applicant" requiring: (1) A bond in case there are debts, and, if there are none, and the

time for filing or presenting claims has expired, the bond will be dispensed with; (2) the executor or administrator to deliver to the heir, legatee, or devisee the proceeds of the estate to which she may be entitled, or only a part thereof, designating it."

Under the petition and oral testimony, it is shown that there are no debts; that due notice to creditors was given; that the time during which claims could be filed or presented had expired; that a suitable building would cost $150,000; and that the estate had funds and securities amply sufficient to cover the amount prayed for in the petition. Therefore, on this showing, we think the court should have set aside to the trustee, not only the real estate, but likewise the sum of $50,000 to be invested by the trustee, and the sum of $150,000 to erect the building.

Finally error is urged in that the court ordered that the [7] inheritance tax should be deducted from the trust funds set over to the bank, and that each bequest, legacy or devise should pay its share of the state inheritance tax, instead of the entire tax being paid out of the residuary estate.

The order is incomplete. The entire question, as stated by counsel, resolved itself into: Upon what sum should Marguerite Morrissey pay inheritance tax at this time? If she is obliged to pay tax on the value of the estate which passes to her, is the trustee bound at this time to pay tax on the remainder? Can the tax on the remainder only be collected when such remainder vests in the person who eventually shall receive the same?

Under section 7724, Revised Codes, all property which passes by will or the intestate law is subject to a tax. This tax is on the right to take by will or succession. "The burden of the tax is not imposed upon the property itself, but upon the privilege of acquiring property by inheritance. In nearly all inheritance tax laws the statutes provide for appraising property to be inherited, but the object of such valuation is not to tax the property itself. It is to arrive at and measure a

price by which the privilege of inheriting can be valued." (*Gelsthorpe* v. *Furnell*, 20 Mont. 299, 39 L. R. A. 170, 51 Pac. 267.)

Marguerite Morrissey must pay for the privilege of inheriting, but she cannot be called upon to pay more than that which is measured by the value of her inheritance. Under section 7724, the lots and whatever sum the building costs must be taxed. In accordance with section 7738, the value of the beneficiary's interest under the tax to be paid is determined, while section 7725 declares the tax shall be immediately due and payable to the county treasurer, together with interest thereon, and shall be and remain a lien on the property until paid.

It cannot be determined at this time in whom or when the remainder of the estate will vest. When Marguerite Morrissey dies, the estate becomes the property of her children or their lineal descendants. In case of no issue then it descends to the children of B. M. Sheehan. If any of his children should die during the life estate of Marguerite Morrissey, the share of that child shall pass to its lineal descendants, and, if both niece and B. M. Sheehan die without issue, it then becomes the joint property of two corporations.

A similar situation is well analyzed under the former inheritance tax statutes of New York, very similar, if not identical, with our own: "The appraiser was unable to determine how many persons might, under the terms of the will of the testator, at some future time acquire the remainder interests in the estate, or who those persons might be, or in what proportions they might take. The learned counsel for the comptroller does not suggest any answer to this difficulty, and the specification of objection in his notice of appeal is that a tax should have been imposed upon 'the remainder interests.' Such a tax would clearly be on the property, and not on the transfer. The difficulty is that no transfer of the untaxed remainder interests has been effected. A method by which ultimate ownership of those interests may be determined has

been indicated. A transfer has been initiated which will eventually be consummated in one of its several possible forms, but the title to the property after the expiration of the life estates of the widow and the four children of the testator has not yet been transferred to or vested in any person whomsoever. To constitute a transfer, there must be a transferee. To create a taxable transfer, there must be a person or corporation, capable of identification, who receives a transfer in such form that the tax on the transfer may be paid 'out of the property transferred.' In the present case the ultimate title to the remainder interests is 'in abeyance' and belongs to no one. They can be sold by no one, and no tax can be paid out of them by anyone. If it be said that a transfer has been effected to the trustees, the plain answer is that their title is measured by their trust duties and by the rights of the beneficiaries under the valid trusts, and ends where that of the ultimate remaindermen begins. The statute must be enforced according to its terms or not at all. Since the only tax is one upon transfers, no tax can be imposed or collected unless a transfer is shown, and all doubtful questions must be solved in favor of the taxpayer and against the state. (*In re McPherson*, 104 N. Y. 306, 10 N. E. 685; *In re Enston's Will*, 113 N. Y. 174, 3 L. R. A. 464, 21 N. E. 87; *In re Vassar*, 127 N. Y. 1, 27 N. E. 394.) By section 222 of the transfer tax law the executors are personally liable for any tax imposed, and they must pay it out of the property transferred. They must not pay it out of the property transferred to the life beneficiaries, either in whole or in part, for their interests have already been fully taxed. To make the payments out of the principal of the estate would be to deprive the life beneficiaries of the income which the amount of the tax would produce. The learned counsel for the respondent suggests cases where the extent of the very obvious wrong and hardship of such a payment would be even greater than in the present one, but the facts of the estate now before me are sufficient to call for the application of a legal principle. The tax is to be paid

'out of the property transferred,' and only one tax is to be charged upon one transfer. To compel one person to pay from his estate a tax, or even a small portion of a tax, properly chargeable against the estate of another, is to do a thing not justifiable upon principle, and not required by the statute. They may not pay it out of the remainder interests, for the reason that they have no control over such interests, and no power is to be found in the will or in the statute, or could be granted by any court, to sell such remainder interests for the purpose of paying the tax, and be relieved from personal liability for such sale. The fact that no appraisal of the remainder interests can now be made is less important than it would be if it were not for the fact that by section 222 of the transfer tax law, as amended in 1897, and as it stood at the time of the death of the decedent, the tax on the remainder interests 'shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof.' The report of the appraiser and the order made thereon are affirmed, and the remainder interests, after the death of the widow and children of the decedent, are determined not to be taxable at the present time, but without prejudice to any proceeding for the taxation of such remainder interests, or any of them, when the persons eventually entitled thereto can be ascertained." (*In re Howell's Estate,* 34 Misc. Rep. 432, 69 N. Y. Supp. 1016; see, also, *In re Hoyt,* 31 Misc. Rep. 720, 76 N. Y. Supp. 504.)

We approve of the above reasoning and language, and think it applicable to the case before us. We therefore hold the remainder estate cannot be taxed at this time.

For the reasons herein stated, we recommend that the cause be remanded to the lower court, with directions to modify the order to the extent that the lots mentioned in the will and the sums of $50,000 and $150,000 be set over to the trustee; that appraisers be appointed by the court to properly appraise the value of the life estate of Marguerite Morrissey and estimate

the inheritance tax due thereon; and that it be ordered that no tax be levied at this time against the remainder estate.

MR. COMMISSIONER SPENCER, being disqualified, takes no part in the foregoing opinion.

PER CURIAM: For the reasons given in the foregoing opinion, it is ordered that the cause be remanded to the lower court, with directions to modify the order to the extent that the lots mentioned in the will and the sums of $50,000 and $150,000 be set over to the trustee; that appraisers be appointed by the court to properly appraise the value of the life estate of Marguerite Morrissey and estimate the inheritance tax due thereon; and that it be ordered that no tax be levied at this time against the remainder estate.

Modified.

BLACKFOOT LAND DEVELOPMENT CO., RESPONDENT, *v.* BURKS, APPELLANT.

(No. 4,403.)

(Submitted June 6, 1921. Decided July 1, 1921.)

[199 Pac. 685.]

Real Property—Adverse Possession—Essentials—Evidence—Insufficiency—Taking Case from Jury—Effect.

Adverse Possession—Payment of Taxes—Evidence.

1. Since payment of taxes was not, prior to the enactment of Chapter 3, Laws of 1917, an element of adverse possession, the fact that the holder of the legal title paid the taxes on the land in question was of no evidentiary value, further than as tending to show that he had not abandoned it.

Same—Declarations by Claimant not Controlling.

2. The fact that the holder of land under an adverse claim did not declare that he owned the land or that he was holding it adversely to the interest of the true owner, is not of controlling weight as evidence, since the question of adverse title is determinable by the claimant's actions rather than words.

---

1. What essential to adverse possession, see notes in 28 **Am. St. Rep.** 158; 88 **Am. St. Rep.** 701.

[60 Mont. 544.]

Same—Occupation Deemed in Subordination to Legal Title.

3. Under section 6435, Revised Codes, the occupation of property by one not the owner is deemed to have been under and in subordination to the legal title.

Same—Possession Alone Insufficient to Support Claim.

4. The question of adverse possession is one of intention, and the possession must be of such a character as to afford the owner the means of knowing of the claim asserted, possession alone, though open and notorious, being insufficient.

Same—Evidence—Insufficiency.

5. Evidence, in an action in ejectment the defense to which was title by adverse possession, that defendant's predecessor to whose interest in the land he succeeded under a will, had fenced the land in connection with a portion of his own, and occupied and cultivated it, that he repeatedly endeavored to purchase it from plaintiff; that defendant, closely associated with decedent did not know that it was being held adversely by decedent, and, as executor of his estate, did not list the property in his inventory, *etc., held* insufficient to warrant a judgment in his favor.

Same—Insufficiency of Evidence—Taking Case from Jury not Denial of Trial by Jury.

6. The evidence in support of defendant's claim having been insufficient to sustain either a verdict or finding in his favor, the court did not err in taking the case from the jury, setting aside its findings, making findings of its own and rendering judgment for plaintiff, and its action was not objectionable as depriving defendant of his right of trial by jury.

Appeal from District Court, Missoula County; Theodore Lentz, Judge.

ACTION by the Blackfoot Land Development Company, a corporation, against W. C. Burks. Judgment for plaintiff and defendant appeals. Affirmed.

Messrs. Madeen & Russell, for Appellant, submitted a brief; *Mr. Chas. A. Russell* argued the cause orally.

The case at bar is in ejectment, purely a law action and the issues made by the pleadings are purely legal issues, and no equitable principles are invoked and none are shown by the record to exist. The defendant was, therefore, entitled to a jury trial of the issues of fact made by the pleadings as a matter of right, and the above findings of the jury are binding and conclusive on the court. (15 Cyc. 11; 9 R. C. L., sec. 2; *Ferris* v. *McNally,* 45 Mont. 20, 121 Pac. 889.)

This case is for all practical purposes the old common-law action of ejectment. The court on its own motion submitted to the jury the two questions evidently deemed to cover the points in controversy, and the jury, upon due deliberation, answered both questions, "No," and against respondent's contention. By these answers respondents are bound. (*Mills* v. *Fletcher*, 100 Cal. 142, 34 Pac. 637.)

While the record is conclusive that plaintiff knew of the occupancy of Donovan and of the inclosure by fence since 1902, no action was commenced to dispossess him during his lifetime and not until his lips were sealed in death. Within a short time afterward this action was commenced to dispossess his successor in interest. Even if he did offer to purchase, it is a well-settled rule of law that an offer to purchase an outstanding title or interest is not a recognition of ownership that interrupts the adverse possession. (*Cannon* v. *Stockmon*, 36 Cal. 535, 95 Am. Dec. 205.) The foregoing case appears to be the leading authority on that question, and is fully supported by the following authorities: R. C. L., sec. 41; Corpus Juris, secs. 150, 153.

Of the numerous cases involving adverse claim decided by this court, we shall content ourselves with citing *Rude* v. *Marshall*, 54 Mont. 27, 166 Pac. 298, that it is not necessary for the adverse claimant to proclaim from the housetops his purpose.

Messrs. Murphy & Whitlock and *Mr. Elmer E. Hershey*, for Respondent, submitted a brief; *Mr. A. N. Whitlock* argued the cause orally.

There is a line of Missouri cases laying down the rule that in actions in ejectment, where the answer asks for affirmative equitable relief, the nature of the action is changed to an equitable one. (*Swon* v. *Stevens*, 143 Mo. 384, 45 S. W. 270; *Myers* v. *Schuchman*, 182 Mo. 159, 81 S. W. 618; *Short* v. *Kidd*, 197 S. W. 64; *Titus* v. *Development Co.*, 264 Mo. 229, 174 S. W. 432.)

We believe that the doctrine of these cases is sound. Defendant's conduct throughout the case and every incident of the trial show clearly that both the court and the attorneys treated it as a suit in equity. The following cases establish the rule in this state that the supreme court will review a case upon the same theory upon which it is tried and that a party is estopped from urging a different theory on appeal. (*Talbot* v. *Butte City Water Co.*, 29 Mont. 17, 73 Pac. 1111; *Hendrickson* v. *Wallace*, 29 Mont. 504, 75 Pac. 355; *Mares* v. *Dillon*, 30 Mont. 117, 75 Pac. 963; *Dempster* v. *Oregon Short Line*, 37 Mont. 341, 96 Pac. 717; *Raiche* v. *Morrison*, 47 Mont. 131, 130 Pac. 1074; *Smith* v. *Barnes*, 51 Mont. 203, Ann. Cas. 1917D, 330, 149 Pac. 963; *Batch* v. *Helena L. & Ry. Co.*, 52 Mont. 517, 159 Pac. 411.)

Defendant's evidence did not make out a case. Following his example, we rely upon the case of *Rude* v. *Marshall*, 54 Mont. 27, 166 Pac. 298. There this court reaffirms the proposition that it had laid down in the earlier decisions in this state, that where legal title is shown in one person and possession in another, it will be presumed in the first instance that the defendant held possession in subordination to such legal title. In that case, there was a showing of further facts indicating clearly not only the actual possession by the defendant, but the claim of right, which is always necessary to establish adverse possession and which claim was so clearly defined and explained by this court in the case of *Morrison* v. *Linn*, in 50 Mont. 396, 147 Pac. 166. In *Rude* v. *Marshall*, for instance, the court comments upon the fact not only that a substantial inclosure was made, but that it was apparent that this act of inclosure was directed against the legal owner and that at the time it was erected there was some friction and controversy between the parties, all of which characterizes the defendant's claim as hostile. The court, in the later case of *Shinors* v. *Joslin*, 56 Mont. 10, 180 Pac. 574, goes no further than to reaffirm what was said in the case of *Rude* v. *Marshall*. In our case we have nothing more than cultivation and in-

closure of a portion of this land together with land which admittedly belonged to defendant. Defendant's case certainly brought out no showing of a hostile claim or claim of right at all, but is, in fact, nothing more than a showing of the bare occupation of agricultural land, and if any presumption arises from such occupation, it is, we submit, that the same is subordinate to the right to the legal owner.

MR. CHIEF COMMISSIONER POORMAN prepared the opinion for the court.

Appeals by defendant from a judgment entered in favor of plaintiff and from an order of the court overruling defendant's motion for a new trial.

The action is in ejectment. The complaint contains the usual allegations in such actions. In his answer the defendant admits the corporate capacity of the plaintiff and puts in issue all the other material averments of the complaint and alleges as a first separate and specific defense that the plaintiff is not the real party in interest, and as a second separate and specific defense defendant alleges title in himself to the lands in dispute by possession and adverse use for more than ten years prior to the commencement of the action.

When the case was called for trial there was some discussion between the parties as to whether a jury was required, but they failed to agree upon the statement of facts, and the court directed that a jury be called. The defendant then admitted that the record title to the land in dispute was in the plaintiff, and that defendant was in possession of the land. Thereupon plaintiff rested, and evidence was introduced by defendant, and rebuttal evidence by plaintiff. At the close of the testimony "the court proceeded to settle the interrogatories to be submitted to the jury, and announced that the court would submit the following." Then follows the two interrogatories submitted. The defendant then requested the court to submit to the jury two questions proposed by him. The request of the defendant was refused, and he excepted to the action of

the court both in refusing to submit the interrogatories proposed by the defendant and in submitting those proposed by the court. The interrogatories submitted by the court to the jury were as to whether the defendant or his predecessor in interest had recognized the ownership of the plaintiff or its predecessor. The jury answered both in the negative. The court set aside the findings of the jury, and adopted certain findings proposed by the plaintiff, and denied other findings proposed by the defendant. Judgment was subsequently entered on the finding adopted to the effect that the plaintiff was the owner in fee of the land in question, and entitled to possession thereof. No damage was awarded to plaintiff.

The appellant claims that the court erred (1) in setting aside the findings made by jury; (2) in adopting the findings proposed by plaintiff; (3) in denying defendant's request to submit the two additional interrogatories to the jury; (4) in rejecting and refusing to adopt the findings proposed by the defendant; (5) in making and giving the judgment entered herein; (6) in overruling defendant's motion for a new trial.

The land in dispute consists of a triangular tract containing about twenty acres in the northeast corner of section 33, township 13 north, range 20 west, the record title of the entire section being in the plaintiff. One Theodore Donovan was, up to the time of his death, the owner of adjoining land described as the S. E. ¼ of section 28 in said township. More than ten years prior to his death Donovan inclosed a part of the land in dispute, together with portions of his own lands, and used the same, each and every year thereafter, for general agricultural and gardening purposes. On June 2, 1915, Donovan died, leaving a will by the terms of which he devised and bequeathed all of his property of "whatever nature and description to Mr. and Mrs. W. C. Burks," and Mr. Burks was by the will appointed "as executor and administrator" of his estate, and on June 26, 1915, letters were issued to W. C. Burks. The will was admitted to probate, inventory made and filed, the estate administered, decree of final distribution made,

but not any reference was made to the land in dispute in any proceeding in the probate court. Defendant's witnesses testified that Donovan had used and occupied the land for more than ten years prior to his death, and some of the witnesses testified that Donovan had occupied the land for twenty-three or twenty-four years. It is admitted that defendant has been in possession of the land since October 1, 1917. Defendant testified that he had known Donovan for fourteen years immediately prior to his death, and that he had used and occupied this land consecutively every year; that he had seen Donovan as frequently as once a month, and that he had helped him cultivate the land. Donovan was moved to the home of defendant during his last illness, and died there. Defendant now owns the S. E. ¼ of said section 28, formerly owned by Donovan. Defendant further says with reference to Donovan's connection with the land that "he always talked to me as though he owned it," but the statements made by Donovan are not in the record, and the statement made by the witness is only his conclusion.

Plaintiff does not dispute the occupancy and cultivation of the land by Donovan, but maintains that the same was not adverse to plaintiff. The testimony introduced by plaintiff tends to show that from 1906 to within three months of the time of his death, Donovan repeatedly tried to purchase this land from the plaintiff, and its immediate predecessor in interest, and that he never did make any claim of adverse ownership; that plaintiff paid taxes on the land during all of this time. Prior to the death of Donovan, one W. P. Maclay had agreed with plaintiff to purchase all of said section 33. Maclay was called as a witness, and in detailing a conversation which he had with Donovan, about a month before his death, said: "I was up there and stopped in. He was out in the garden, and we got to talking about that land, and he said, 'If you buy this section, I would to have you let me have what is here this side of the road. * * * I have tried to buy it, but I haven't been able to do it. Perhaps if you buy the whole

section, you could do it that way.'" This evidence, in so far as it related to Donovan's efforts to buy the land, is not disputed. The claim that the action is not brought in the name of the real party in interest is not sustained by any evidence. We then have four admitted facts in this case: (1) That the plaintiff has the record legal title to the land in question; (2) that it was occupied and cultivated by Donovan for more than ten years prior to the commencement of the action; (3) that Donovan during his occupancy repeatedly tried to buy the land from the plaintiff and its predecessor in interest; (4) that defendant by reason of the will succeeded to whatever interest Donovan had in the land.

The payment of taxes on the land by the plaintiff is of no [1] value as evidence, except a mere incident tending to show that plaintiff had not abandoned the land, for the payment of taxes is not an element of adverse possession unless made so by statutory requirement. (*Morrison* v. *Linn*, 50 Mont. 396, 147 Pac. 166.)

There was not any statute in this state requiring the adverse holder to pay taxes until the enactment of Chapter 3 of the Session Laws of 1917, nor is the fact that Donovan did [2] not declare that he owned the land or that he was holding it adversely to the interest of the plaintiff of controlling weight as evidence for it is actions rather than words that must determine the question. (*Rude* v. *Marshall*, 54 Mont. 27, 166 Pac. 298.)

The occupation of property by one not the owner is deemed [3, 4] to have been under and in subordination to the legal title. (Section 6435, Rev. Codes; *Morrison* v. *Linn*, *supra*.)

"The question of adverse possession is one of intention. The intention must be discovered from all the circumstances of the case." (*Lamme* v. *Dodson*, 4 Mont. 560, 2 Pac. 298.)

"The possession of real estate may be open and notorious and still not be adverse." (*Crawford* v. *Ahrnes*, 103 Mo. 88, 15 S. W. 341.)

The adverse possession must be of such a character as to afford the owner the means of knowing of it and of the claim. (*Hicklin* v. *McClear*, 18 Or. 126, 22 Pac. 1057.)

Possession alone is not sufficient to sustain a claim of title [5] by adverse possession. Under the facts presented in this case, the sole basis of defendant's claim are the provisions of the will, and the fact that Donovan fenced a part of the land in connection with a portion of his own, and occupied and cultivated the same. In addition to the presumption that occupancy is subservient to the legal title is the undisputed evidence that Donovan repeatedly tried to purchase the property from the plaintiff and its predecessor in interest. The defendant, notwithstanding his close association with Donovan, evidently did not know that he intended to hold this land adversely, or that it constituted a part of his estate. His evidence was to the effect that he was very familiar with this land, and the fact that Donovan occupied it and cultivated it for a period of fourteen years, and still he settled the estate without listing this property as a part thereof, or making any reference to it until after the final decree had been entered. [6] The evidence as here given is not sufficient to sustain either a verdict or a finding in favor of the defendant; hence the court did not err in taking the case from the jury and making its findings and rendering judgment in favor of the plaintiff. The appellant's claim that he was deprived of the right of trial by a jury is therefore wholly immaterial. We may remark, however, that neither in the case of *Chessman* v. *Hale*, 31 Mont. 577, 3 Ann. Cas. 1038, 68 L. R. A. 410, 79 Pac. 254, nor in any other case, has this court ever held that a party may not by his course of conduct bar himself from the right of raising the question that he was not granted a trial by jury in a civil action.

We recommend that the judgment and order appealed from be affirmed.

PER CURIAM: For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

Affirmed.

WICK, RESPONDENT, v. WESTERN LIFE & CASUALTY CO., APPELLANT.

(No. 4,423.)

(Submitted June 8, 1921. Decided July 1, 1921.)

[199 Pac. 272.]

Health Insurance—Nonpayment of Premium—Preliminary Notice of Disability—Failure of Notice Required by Policy—Best Notice Under Circumstances—Question of Fact for Jury.

Health Insurance—Nonpayment of Premium—What Does not Constitute.

1. Where plaintiff, insured against sickness, had assigned his wages to defendant company to the extent of the monthly premium due thereon, seeing to it that there was always sufficient money in the hands of his employer to meet payment, and defendant looked to the latter for payment and collected the premiums from him, the employer never refusing to pay upon demand, failure to make certain payments was ascribable to defendant and not to the insured, and therefore the policy did not lapse on account of nonpayment.

Same—Preliminary Notice of Disability—Character of Proof.

2. *Held*, that the provision in a health policy requiring written notice within ten days after commencement of disability from sickness, must be read in connection with section 5628, Revised Codes, providing that where preliminary proof of loss is required by a policy, the insured need not give such proof as is necessary in a court of justice, it being sufficient if he give the best evidence which it is in his power to give at the time; *held*, further, that conditions may be such as to relieve insured from giving any notice whatever except that contained in his final proof of disability.

Same—Best Notice Possible Under Circumstances—Question for Jury.

3. Where plaintiff, two days after being taken ill, lost his senses and remained in that condition for thirty-five days, when he requested a friend to notify defendant, the questions whether the circumstances were such as to excuse the giving of the notice stipulated for in the policy, other than the proof of loss or disability, or whether he gave the best notice within his power at the time, were questions of fact for the jury.

Appeal from District Court, Silver Bow County; Edwin M. Lamb, Judge.

---

2. Validity of provision in policy of health insurance requiring notice of illness to be given within a specified time, see note in 15 Ann. Cas. 218.

3. As to when strict compliance with requirement as to time of notice in accident and health policy is excused, see notes in 18 L. R. A. (n. s.) 109 and 27 L. R. A. (n. s.) 319.

ACTION by Erick Wick against the Western Life & Casualty Company. Judgment for plaintiff and defendant appeals. Reversed and remanded.

Mr. Joseph H. Griffin, for Appellant, submitted a brief and argued the cause orally.

No appearance in behalf of Respondent.

MR. CHIEF COMMISSIONER POORMAN prepared the opinion for the court.

In this action the plaintiff seeks to obtain judgment against the defendant for an amount alleged to be due him on a contract of insurance existing between plaintiff and defendant. The case was tried to a jury, but at the close of the testimony the court sustained the plaintiff's motion for a directed verdict, which was thereupon returned by the jury, and judgment entered thereon. The defendant appeals from this judgment and from the order overruling his motion for a new trial.

The plaintiff alleges: "That on or about the fifth day of April, 1916, the defendant entered into a contract of insurance with this plaintiff, in, by, and through which during the life of said contract he was insured against all disability resulting from illness. * * * That he paid to the defendant corporation the sum of $2.50 per month from April, 1916, to and including February, 1917. That commencing in the month of December, 1916, he was disabled from carrying on any employment by rheumatic fever for two months thereafter; that by and through the terms of said policy for such disability he was to receive an indemnity therefor in the sum of $60 per month." That he made demand for said sum, but that payment was not made. No demurrer was filed, and the defendant's answer consists wholly of a general denial, except that it admits the corporate capacity of defendant. The policy was introduced in evidence without objection. If the complaint was open to the objection now made, the defects were removed

by the evidence admitted without objection; hence defendant's contention that the complaint does not state a cause of action cannot be sustained.

During the trial of the cause, in answer to a remark made by the court, defendant's counsel said: "Well, I will state, if the court please, that our defense is a lapse of payment on the policy, and also he didn't notify the company within the required time, as stipulated by the contract, of his illness." The case was tried upon this theory. The questions involved on this appeal, therefore, are: (a) Had the policy lapsed by reason of nonpayment? (b) Did the plaintiff notify the company of his illness within the time named in the policy, or show conditions that would excuse him from giving such notice at an earlier date than the proof of disability?

It appears that at the time this policy was executed, the [1] plaintiff was in the employ of one Gus Wilson, and that the defendant received from plaintiff an assignment of plaintiff's wages to the extent of $2.50 per month. The testimony introduced by the defendant is to the effect that the defendant always looked to Wilson for the premium, and that it collected from Wilson the amount due on the policy as premium. The undisputed testimony is also to the effect that the plaintiff always had money with Wilson to meet these payments. It does appear from the evidence that some of the payments were not made within the time named in the policy, but so far as this record is concerned, the defendant itself assumed the responsibility of making demand on Wilson, and there is not any evidence here that Wilson at any time refused or hesitated to pay when demand was made on him. The court did not err in holding that the policy had not lapsed.

The provision of the policy, with reference to notice, is as [2] follows: "Written notice of injury or of sickness on which claim may be based must be given to the company within twenty days after the date of the accident causing such injury or within ten days after the commencement of the disability

from such sickness. Failure to give such notice shall invalidate the claim and relieve the company of all liability."

With reference to the notice, the plaintiff testified that he went to the hospital on the 10th of December, 1916; that he lost his senses about December 12, and he said: "I was down there for 35 days. I was not out of my head all the time. Just as soon as I got my senses, I notified the company. I cannot remember the date. There was a fellow up to the hospital, and I told him to go down to Wilson, the tailor, and he went to the Western Life and reported. I don't know whether this friend of mine went and reported this sickness of mine to the company or not. He came up there and said he reported it. I don't know of my own knowledge. * * * From about the 12th of December till some time in January I didn't have any sense at all. I don't remember anything. Dr. Rhodes was the only doctor who treated me there in the hospital."

The hospital referred to was the Murray Hospital in Butte, Montana. It is further in evidence that Dr. Rhodes signed the certificate, but neither the certificate nor its contents appear in the record.

About the 4th of February, 1917, the plaintiff went to the office of the defendant, and notified it of his sickness, and made demand for payment. The only witness on the part of the plaintiff was the plaintiff himself.

The provisions of the policy which require written notice within ten days after the commencement of the disability must be read in connection with the provisions of the statute, section 5628, Revised Codes, which provides: "When preliminary proof of loss is required by a policy, the insured is not bound to give such proof as would be necessary in a court of justice; but it is sufficient for him to give the best evidence which he has in his power at the time." And conditions may be such as to relieve the injured party from giving any notice at all except that contained in his final proof of disability. It is

further held that "It need not be that full, clear, and explicit proof which would be required upon the trial of an issue upon the question, but it must be such reasonable evidence as the party can command at the time, to give assurance that the event has happened upon which the liability of the insurers depends. * * * The purpose of the condition is that the insurer may be able intelligently to form some estimate of his rights and liabilities before he is obliged to pay." (*Da Rin* v. *Casualty Co. of America*, 41 Mont. 175, 137 Am. St. Rep. 709, and note; 27 L. R. A. (n. s.) 1164, 108 Pac. 649; *O'Neill* v. *Massachusetts Ben. Assn.*, 63 Hun, 292, 18 N. Y. Supp. 22.)

But the question whether the circumstances were such as [3] to excuse the giving of notice other than the proof of loss or disability, or whether the plaintiff gave the best notice within his power at the time, were questions of fact to be determined by the jury, and the jury "are the judges of the effect or value of evidence addressed to them." (Sec. 8028, Rev. Codes.)

This case is clearly within the rule laid down by this court in *Whalen* v. *Harrison*, 26 Mont. 316, 326, 67 Pac. 934, 935, wherein, under similar circumstances it was held that "The court should not have taken up the duty of the jury, but should have left them to determine the weight to be given to his evidence."

We think, in this case, the court committed error in sustaining plaintiff's motion for a directed verdict, and recommend that the judgment be reversed, and the cause remanded for a new trial.

PER CURIAM: For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded for a new trial.

Reversed and remanded.

STATE, RESPONDENT, *v.* BESS, APPELLANT.

(No. 4,717.)

(Submitted June 2, 1921. Decided July 2, 1921.)

[199 Pac. 426.]

Criminal Law—Murder—Change of Venue—Local Prejudice—Newspaper Accounts—Evidence—Experts—Reading Extracts from Text-books — Instructions — Alibi — Jury — Separation During Trial—Striking Affidavits.

Murder—Change of Venue—Local Prejudice—Proper Denial.

1. Evidence produced by defendant in support of his motion for change of venue on account of local prejudice, consisting of six affidavits and the oral statements of three witnesses, to the effect that because of prejudice against defendant, under charge of murder, he could not secure a jury in the county which would give him a fair and impartial trial, *held* insufficient to show that the trial court abused its discretion, where the state produced affidavits of more than a hundred persons from all parts of the county, deposing that in their respective neighborhoods there existed no prejudice against him, and where the *voir dire* examination of the jury disclosed that of the forty talesmen called, only fourteen were excused because they had formed an opinion upon the merits of the case.

Same—Change of Venue—Newspaper Accounts—When Insufficient to Show Prejudice.

2. Before the effect of newspaper articles giving an account of a murder can be pronounced so highly prejudicial as to warrant a change of venue, it must be shown that they were passionate enough to excite undue prejudice, to the extent of rendering it impossible for accused to secure a jury free from exception.

Same—Evidence—Reading Extracts from Text-books—When Permissible.

3. Where defendant's counsel, on cross-examination of a physician, had read from a medical text-book, and, for the purpose of discrediting witness, asked him if he agreed with a certain portion of the statement of the author upon the effect produced by hard-nosed bullets, and if a soft-nosed bullet would not mushroom as soon as it struck tissue, the state was properly permitted on redirect, for the opposite purpose, to read the entire statement upon the subject and ask the witness if he agreed with it.

Same—Firearms—Experts—Admissibility of Evidence.

4. A hunter and an ex-soldier who had qualified as experts in the use of a rifle were properly permitted to testify as to the effect of hard and soft nosed bullets to rebut testimony in support of de-

---

1. Change of venue on account of impossibility of impartial trial in the county, see note in 74 Am. Dec. 244.

2. Weight of newspaper articles as evidence of prejudice against accused entitling him to change of venue, see note in 18 Ann. Cas. 789.

3. Examination of expert witnesses in connection with use of scientific books, see note in 16 Ann. Cas. 818.

fendant's theory that the death of deceased was caused by a hard-nosed bullet.

Same—Experts—Specific Instances—Harmless Error.

5. Though the practice of calling for specific instances to qualify a witness to give expert evidence should not be sanctioned, the admission of testimony of an ex-soldier as to particular instances of the effect of hard-nosed and soft-nosed bullets on soldiers of the United States in France was not reversible error where his answers were more favorable to defendant than to the state, and therefore harmless.

Same—Experts—Foundation for Opinions—Evidence.

6. One offering an expert as a witness, for the purpose of showing the strength of the opinion he is about to give, may have him specify in detail the observations on which the opinion is based, and the opposite party on cross-examination may call for the particular observations of the witness, and probe the underlying facts to the fullest extent for the purpose of affecting the strength of the opinion expressed.

Same—Alibi—Instructions—Refusal, When not Error.

7. Instructions that the burden was on the state to prove that defendant was present at and participated in the homicide, and that, if it failed to prove such facts beyond a reasonable doubt, the jury must acquit him, were properly refused, defendant having tendered no instruction defining the term "alibi" in such words that the jury could not have misunderstood the issue presented.

Same—Alibi—Refusal of Instruction—When Harmless.

8. Where from the entire charge the jury must have fully understood that if they entertained a reasonable doubt whether defendant was so far away from the scene of the shooting that he could not have done it, he must be acquitted, refusal of offered instructions to the effect that the burden of proving his presence or participation in the crime was upon the state, and that, failing to sustain such burden, acquittal should follow, was not reversible error.

Same—Instructions—Justification—Mitigation—Burden of Proof.

9. In a prosecution for murder, where the fact that defendant killed deceased was established, and there were no circumstances tending to justify or excuse the act, it was not error to instruct, in the language of section 9282, Revised Codes, that, the commission of the homicide being proved, the burden of proving circumstances of mitigation, justification, or excuse devolved on defendant, unless the state's proof showed the crime amounted only to manslaughter, or that defendant was justifiable or excusable.

Same—Trial—Jury—Separation—Striking Affidavits—When not Reversible Error.

10. Where all the jurors and bailiffs testified that the jury was kept together, heard no other evidence than that adduced on the trial, communicated with no one, and that no facts other than those in evidence were considered by them, it was not reversible error to strike out affidavits to the effect that they were not kept together during the trial and their deliberations, since the result would have been the same had the court considered the question on the merits.

Appeals from District Court, Stillwater County; Albert P. Stark, Judge.

[60 Mont. 558.]

ELIJAH BESS was convicted of murder in the first degree, and appeals from the judgment and order denying a new trial. Affirmed.

Mr. E. E. Enterline, Mr. C. C. Cisel and *Mr. Geo. A. Westover,* for Appellant, submitted a brief; *Mr. Enterline* argued the cause orally.

The petition of the defendant for a change of venue should have been granted and the cause transferred to some county where prejudice did not exist and where a fair and impartial trial could have been had. (Rev. Codes, sec. 9219; *State* v. *Spotted Hawk,* 22 Mont. 33, 55 Pac. 1026; *People* v. *Suesser,* 132 Cal. 631, 64 Pac. 1095.) The court erred in permitting Doctor Smith to read into the record medical authorities and express his opinion upon those authorities concerning the nature and character of gunshot wounds when inflicted with hard-nosed and soft-nosed bullets and in which he was permitted to express an opinion upon a hypothesis not predicated upon the evidence. (*Schumacher* v. *Mary Hospital et al.,* 58 Mont. 447, 193 Pac. 397.)

The hypothesis in the question propounded to Dr. Smith and here under discussion instead of being predicated upon facts introduced in evidence was admitted in the face of the fact that Dr. Smith had testified that a wound caused by a mushroomed bullet would always leave a tear at the point of exit and that the wound of the deceased at the point of exit was a clean-cut incised wound as hereinbefore mentioned. The principle is elementary that in asking a hypothetical question of an expert witness the facts proven must be taken as a basis for the hypothesis. (Rogers on Expert Testimony, 2d ed., sec. 27; *Carman* v. *Montana Cent. Ry. Co.,* 32 Mont. 137, 79 Pac. 690.)

The testimony given by the witnesses Brownfield and Carleton in rebuttal on behalf of the state was no doubt introduced to meet the testimony given by Mr. Frederick Collins, who

testified as an expert on gunshot wounds on behalf of the defendant. Collins was the only expert who had a thorough knowledge of the subject upon which testimony was admitted and the only expert who was properly examined and who gave competent testimony. Instead of counsel for the state examining Brownfield and qualifying him as an expert by his experience and observation, counsel for the state, as shown by the specification of errors, was permitted to interrogate the witness concerning particular cases. This was error. "While the opinion of experts may be based on their observation and experience in similar cases, yet the principle is well settled that such witnesses cannot on their direct examination be questioned concerning particular cases which have happened to come within their observation, and which have no connection with the case in hand." (Rogers on Expert Testimony, 2d ed., sec. 25.)

Instruction No. 15, given by the court over the objection of the defendant, was no doubt predicated upon the provisions of section 9282, Rev. Codes 1907. An instruction would of course be proper in a case where the evidence disclosed circumstances coming under the provisions of that section, although we are at a loss to comprehend what the clause "that the defendant was justifiable or excusable" means. Specific objections were made to the giving of this instruction by counsel for the defendant upon the grounds that all that was required of the defendant in the case in the event that the state made out a *prima facie* case against him was to introduce sufficient evidence to create in the minds of the jury a reasonable doubt as to his guilt, and further, that there was no evidence introduced upon which to predicate the instruction. This court has had occasion to refer to and construe the provisions of section 9282, *supra*, in cases of homicide, but an examination of the cases will disclose that in all of them the killing was admitted and a plea of justification or excuse was interposed. (*State* v. *Byrd*, 41 Mont. 585, 111 Pac. 407; *State*

v. *Crean*, 43 Mont. 47, Ann. Cas. 1912C, 424, 114 Pac. 603; *State* v. *Leakey*, 44 Mont. 354, 120 Pac. 234; *State* v. *Halk*, 49 Mont. 173, 141 Pac. 149; *State* v. *Kuum*, 55 Mont. 436, 178 Pac. 288.) It is our contention that the provisions of that section have no application at all where a defense of alibi is interposed. There would be nothing in the evidence in a case of alibi justifying or excusing the homicide. We find that this court in the case of *State* v. *Felker*, 27 Mont. 451, 71 Pac. 668, used the following language: "In this state it is now the established rule that even where the so-called affirmative defenses are interposed—such as alibi, insanity and justifiable homicide—no greater burden rests upon the defendant than to introduce sufficient evidence to raise a reasonable doubt. This rule has been applied in the construction of sec. 2081 of the Penal Code (sec. 9282, *supra*)."

The affidavits attached to the defendant's motion for new trial clearly show that the jury was permitted to commingle indiscriminately with citizens and witnesses who were prejudiced against the defendant. The bailiffs were not sworn and were changed by the sheriff without permission or order of the court. One of the state's witnesses acted as bailiff, and according to his testimony he was placed in charge of the jury by the sheriff after the court adjourned and remained with the jury for one night. (Rev. Codes, sec. 9300; *People* v. *Maughs*, 149 Cal. 253, 86 Pac. 187; *People* v. *Cord*, 157 Cal. 562, 108 Pac. 511; *Nicholson* v. *State*, 18 Wyo. 298, 106 Pac. 929.)

Mr. Wellington D. Rankin, Attorney General, *Mr. L. A. Foot*, Assistant Attorney General, for Respondent, submitted a brief, Mr. *Foot* argued the cause orally.

The trial judge is generally familiar with the local situation, and can properly estimate the weight to be given to the affidavits and evidence, submitted on a motion for change of venue, and a judicial discretion exercised, under such circumstances, should not be interfered with, unless its abuse is

so clearly manifest as to call for a reversal. (*State* v. *Welty*, 65 Wash. 244, 118 Pac. 9; *State* v. *Caseday*, 58 Or. 429, 115 Pac. 287; *Johnson* v. *State*, 1 Okl. Cr. 321, 18 Ann. Cas. 300, 97 Pac. 1059.) The publishing of accounts in newspapers pretending to give the facts of the crime, if not inflammatory in their nature, are not sufficient to justify granting a change of venue. (*State* v. *Brown*, 130 Iowa, 57, 106 N. W. 379.) "An affidavit against a whole community that states the mere conclusions of the witness is of no consequence whatever. It ought to state the facts so that the court, and not the witness, may determine whether the community is prejudiced. The court is to make a finding from the facts. It is to determine in a judicial manner whether an impartial trial may be had." (*State* v. *Spotted Hawk*, 22 Mont. 33, 55 Pac. 1026; *Kennon* v. *Gilmer*, 9 Mont. 108, 22 Pac. 448; *Territory* v. *Manton*, 8 Mont. 95, 19 Pac. 389; see, also, *State* v. *Russell*, 13 Mont. 184, 32 Pac. 854; *Territory* v. *Corbett*, 3 Mont. 50.)

Appellant complains that the expert witness, Doctor Smith, was permitted to read from medical books and express his opinion as to the correctness of the text of such books. In the face of the decision of this court in the case of *Schumacher* v. *Murray Hospital et al.*, 58 Mont. 447, 193 Pac. 397, we must admit that such method was improper, and if on the testimony of these two witnesses depended the case, it would probably be sufficient grounds for reversal. However, other witnesses who testified from actual experience and without any medical books corroborated the witnesses complained of. There was sufficient expert testimony, untainted by error, to enable the jury to find that the bullet which killed the deceased was soft-nosed, and the error becomes of little consequence and nonprejudicial to the appellant. (See 17 C. J., sec. 3663 (b), at p. 321.)

The witnesses Brownfield and Carleton exhibited a degree of knowledge on the subject of soft and hardnosed bullets, gained from experience and observation, and their opinion was

valuable and entitled to be received, in the exercise of sound discretion of the trial court, and submitted to the jury for what it was worth. (5 Ency. of Evidence, 530–533; *People* v. *Gibson*, 106 Cal. 458, 39 Pac. 864.)

Instruction No. 15, assigned as error by appellant, is in the exact words of the statute, section 9232, Revised Codes of 1907, and is not inherently erroneous. (*State* v. *Powell*, 54 Mont. 217, 169 Pac. 46; *State* v. *Halk*, 49 Mont. 173, 141 Pac. 149.) If it has no application to this case, it certainly does not affect any rights of the appellant, and their error, if it be one, is harmless.

The affidavits of the bailiffs and the jurors, filed in opposition to the charges by appellant that the jury had not been properly kept together and had been influenced by discussions with other persons during the progress of the trial, denied appellant's charges. If the bailiffs failed to perform their duty, or the jurors disregarded the admonition of the court not to discuss the case or allow it to be discussed in their presence by others, then they, or such of them as might have been guilty, would have been in contempt of court. However, the trial court was evidently satisfied that its orders and instructions had been complied with, as he made no order citing anybody for contempt. In the case of *People* v. *Maughs*, 149 Cal. 253, 86 Pac. 187, cited by appellant, the court, after placing the jury in the custody of the sheriff, made another order permitting part of them to go home. The case is hardly in point, nor is the case of *Nicholson* v. *State*, 18 Wyo. 298, 106 Pac. 929.

Mr. M. L. Parcells, County Attorney of Stillwater County, for Respondent, submitted a supplemental brief, and argued the cause orally.

MR. JUSTICE COOPER delivered the opinion of the court.

Appeals from the judgment and order denying a new trial. The defendant was tried in the district court of Stillwater

county and convicted of murder in the first degree, the jury fixing his punishment at imprisonment in the state penitentiary for life.

From defendant's brief, we take the following statement of the facts: "On the morning of July 5, Lyons and his hired man went to work on a fence belonging to Lyons, which ran north and south, and then east and west, on the lands belonging to Lyons, and situate north of the defendant's place of residence. Lyons was engaged in removing wire from posts on a fence on the north boundary line of defendant's lands, which wire, when removed, was taken to the hired man, who placed it on the new fence in the course of construction by Lyons. Lyons was working on an elevation west of the hired man, and less than a quarter of a mile distant from him, but could not be seen by the hired man on account of the elevation. Lyons was seen about 2 o'clock in the afternoon by the hired man when he came down from the hill for the purpose of getting a drink of water from the Stillwater River, which runs in an easterly direction by the premises of the defendant and the deceased. After getting a drink Lyons again went west on the elevation where he had been engaged in working before, and was not seen again by the hired man until the latter found his body about 6 o'clock in the evening of that day. The body was found apparently 1,365 feet northwest of defendant's dwelling-house. The difference in the elevation between defendant's dwelling-house and the place where Lyons' body was found was 364 feet; that is to say, the point where Lyons' body was found was 364 feet higher than the dwelling of the defendant. The physician who performed the autopsy testified that an examination of the body disclosed that the bullet passed through the lower portion of the abdominal cavity, a portion of the rectum, the lower part of the sigmoid, the iliac vein, and deflected from the rim of the pelvis and passed out, causing death. On the morning of July 5, 1919, the defendant left his home, and did not return until evening. On his return

about 5 o'clock in the evening he sat down on the doorstep of his home reading the newspapers, and then he and his wife went in the direction of and by his barn, which was situate northwest of his house. In going in that direction, defendant carried his rifle, and he and his wife were gone about 15 minutes. On his return he took some provisions and his rifle and cartridges, and went south into the mountains. He was not seen again until the evening of July 8, 1919, when he came to a neighbor's ranch several miles distant from his home. Upon learning of the death of Lyons, and that he was accused of the killing, he went to another neighbor in the vicinity, who had him taken to Billings, where he surrendered himself." The evidence of the surveyor who furnished the data showing the distance of the body from the different objects was that the body could be seen from the west end of the barn, which the defendant passed in leaving the house, and returning thereto immediately before starting for the mountains. It could not be seen at any point nearer the house than the west end of the barn, a distance of 170 feet from the house. The foregoing will suffice to illustrate the points necessary to be considered in determining this appeal.

The defendant assigns twelve errors, which he claims were [1, 2] committed by the court below. The first is based upon its refusal to grant his motion for a change of venue to some county other than Stillwater or Sweetgrass. The petition alleges that because of prejudice existing against him in Stillwater county, and a general belief that he is guilty, defendant will be unable to secure a jury in Stillwater county that will give him a fair and impartial trial; that the feeling against him grew out of trouble between himself and the deceased, and the publication of two newspaper articles, one appearing in the "Columbus News Democrat," a newspaper published at Columbus, and circulated throughout Stillwater county, the other in the "Billings Gazette," a newspaper published in Billings, and circulated throughout Stillwater and adjacent counties. His prayer is that the case be transferred

to some county other than Stillwater county. In support of his motion, he presented to the trial court proof in the form of six affidavits of as many persons, residing in the neighborhood of the tragedy, in each of which it was averred that defendant could not secure a jury in Stillwater county that could give him a fair and impartial trial, for the reason that many people in all parts of Stillwater county—and especially in Columbus, and south of the Yellowstone River—are prejudiced against him. The affidavit of Mr. E. E. Enterline, one of his counsel, was to the effect that he, together with his co-counsel, Mr. Cecil, traveled over portions of Stillwater county, took pains to investigate the feeling generally entertained by citizens of that county, and found the opinions of many citizens thereof to be that defendant had killed Lyons, and that the newspaper articles referred to and the rumors of trouble between the two men were responsible for the sentiment against him. The affidavit further states that an examination of the jury list disclosed that twenty-nine of the forty jurors, examined as to their qualifications to serve as trial jurors, reside on the south side of the Yellowstone River, and in the town of Columbus, and that because of this feeling the defendant could not get a fair and impartial trial in the county of Stillwater. The oral testimony of Mr. Cecil was to the effect that he had visited various parts of Stillwater county; had conversed with some fourteen citizens of the county residing along the Stillwater River, in the vicinity of the scene of the killing; and that all of them, as well as others with whom they had conversed, expressed the same opinion. Oral evidence of some two or three other witnesses was of substantially the same character. The proof, however, shows no attempt, concerted or otherwise, to do the defendant any physical harm.

The foregoing is a summary of all the evidence adduced in support of the motion for a change of venue. To rebut this proof, the state produced affidavits of more than one hundred witnesses, from all parts of Stillwater county who testified that no prejudice existed against the defendant in their respective

neighborhoods; that the case had not been discussed, and that the defendant could obtain a jury in Stillwater county that would give him a fair and impartial trial.

In the evidence thus produced there is little beyond the expression of individual opinion. The witnesses on behalf of the defendant were evidently his friends, living in the immediate vicinity of the homicide, or in the town of Columbus, their evidence at best reflecting the view of a small proportion of the citizenship of Stillwater county. The affidavits presented by the state were made by citizens residing in all parts of Stillwater county, a great majority of whom were entire strangers to both the defendant and the deceased, appeared to know practically nothing about the case, and were therefore free from bias or prejudice and prompted by no motive other than a desire to see that justice was done. Under these circumstances, we are unable to see how the district court could have reached any other conclusion.

The newspaper article published in the "Columbus News Democrat" spoke of the deceased as a highly respected citizen of the community, pointed the finger of suspicion at the defendant, and gave the substance of the evidence given at the coroner's inquest. The article published in the "Billings Gazette" gave an account of the killing, followed by an interview with the defendant in which he gave what purported to be his version of the trouble between himself and the deceased, and the shooting resulting therefrom. That his account was as favorable to his cause as he was able to make it, and calculated to avert suspicion against him, is a matter hardly open to doubt. At any rate, it did no harm to his cause, and aroused no unusual amount of feeling against him. The character of evidence thus produced is not at all convincing. It gives a court very little, if any, foundation upon which to make a finding. We do not understand that the mere prevalence of opinion in a small portion of the political division from which the trial jury is to be selected furnishes more than a circumstance from which it can be inferred that

a community is so prejudiced against an accused as to deprive him of any of his constitutional rights. The publication of an account of a killing, and even intimating that the defendant is the guilty party, is of itself not to be regarded as a sufficient ground for the transfer of the case to another county for trial. Newspapers do, no doubt, affect public opinion in matters upon which they take a decided stand; but before their effect can be pronounced so baneful and highly prejudicial as to warrant a change of venue, it must be shown that they were passionate enough to excite undue prejudice, to the extent of rendering it impossible for an accused to secure a jury free from exception. The ruling of the court was against the defendant upon this issue. The *voir dire* examination of the jury disclosed that, of the forty talesmen called, ten were peremptorily challenged by the defendant, four by the state, and only fourteen were excused because they had formed an opinion upon the merits of the case. This fact alone goes a long way in overcoming the charge that the court abused its discretion by refusing to change the place of trial. Upon the whole, we find no reasonable ground upon which to differ with the district court upon this issue. The law upon this branch of the case was so clearly and precisely expounded by Mr. Commissioner Jackson, speaking for this court in *State* v. *Davis, ante,* p. 426, 199 Pac. 421, that further discussion of it is now unnecessary.

The second error of which defendant complains is that, **[3]** on redirect examination, the court permitted Doctor Smith to answer the question of counsel for the state as to whether or not he agreed with the statement of the author of a text-book from which counsel for the state was reading. The question arose in this manner: The witness was the physician who performed the autopsy upon the body of the deceased. On direct examination he had merely described the condition of the body, the course of the bullet, the wound, and its appearance. Defendant's counsel on cross-examination, produced a medical text-book, read from it, and asked the witness if he

agreed with the statement of the author upon the effect produced by hard-nosed bullets, and if a soft-nosed bullet would not mushroom as soon as it struck tissue. To this the witness answered that his understanding was that it might mushroom from a bullet shape into a mass, possibly the shape of a nickel, or a quarter, but that he was not familiar enough with the subject to express an opinion. Upon redirect examination, counsel for the state read the rest of the statement upon the subject, and asked the witness if he agreed with the entire statement of the author. Upon this situation counsel insists that the rule announced in *Schumacher* v. *Murray Hospital,* 58 Mont. 457, 193 Pac. 397, was violated. It was there held to be error for counsel, upon examination in chief, and as substantive evidence, to read from text-books. The rule contended for by counsel is undoubtedly the correct one, the effect of reading extracts of books to the jury, upon direct examination, being to prove the substantial facts therein stated. This may not be done. On cross-examination the rule is different. Medical books may be referred to on cross-examination to discredit the testimony of experts who refer to them as authority for, or in support of, their opinions, and for the purpose of testing their knowledge of the subject upon which they give opinions. (*Hess* v. *Lowrey,* 122 Ind. 225, 17 Am. St. Rep. 355, 7 L. R. A. 90, 23 N. E. 156.) Counsel, by inviting the doctor's opinion upon the effect of different bullets upon human flesh, and using a text-book for the purpose of discrediting him (as he had a right to do), opened the door for counsel for the state to fortify the doctor's opinion by calling his attention to the whole statement for the opposite purpose. That assignment is therefore entirely without merit.

Error is also predicated upon the ruling of the court in [4] permitting the witness Brownfield, an expert in the use of a rifle, and as a hunter, and Carleton, who had served as a soldier in France, to state in rebuttal the effect produced by hard-nosed bullets, as distinguished from soft-nosed bullets, upon the ground that the proof of their qualifications was in-

sufficient; and particularly in allowing Carleton to describe the appearance of wounds inflicted upon our soldiers in France by different kinds of bullets. The testimony objected to was given to rebut the testimony of Collins that the death of Lyons was produced by the use of a hard-nosed bullet fired from a high-powered rifle. Both witnesses qualified as experts in the use of firearms to the satisfaction of the court. The record does not sustain counsel's contention in that respect. The effect produced by different bullets did not arise in the state's case in chief. It was competent, of course, for the defendant to introduce proof in support of his theory that the death was caused by a hard-nosed bullet, rather than by a soft-nosed bullet, defendant having sworn that he had never used and had never possessed any hard-nosed bullets. It was not out of place for the state to attempt to rebut that evidence by other witnesses possessing like qualifications.

Neither do we think that the reference to particular in-
[5] stances of the effect of bullets upon the soldiers of the United States in France was harmful to the defendant on this occasion. The practice of calling for specific instances as a means of qualifying a witness to give expert evidence ought not to be sanctioned. A careful examination of the answers in response to inquiries of counsel upon that subject, however, convinces us that they were more favorable to the defendant than they were to the state, and therefore harmless. It is
[6] always competent for a person offering an expert as a witness, for the purpose of showing the strength of the opinion which he is about to give, to have the witness specify in detail the observations upon which the opinion is based, and it is also, of course, competent for the opposite party, on cross-examination, to call for the particular observations of the witness, and to probe the underlying facts to the fullest extent for the purpose of thus affecting, as far as possible, the strength of the opinion expressed. (*People* v. *Faber*, 199 N. Y. 256, 20 Ann. Cas. 879, 92 N. E. 674, 8 R. C. L., sec. 9, p. 577.) In 17 Cyc. 260, it is said that "The judgment of an expert is of value pre-

cisely in accordance with what there is back of it. Every proper test should therefore be applied. Being hypothetical, it stands or falls with the existence of the facts upon which it is predicated." It would be impracticable, if not impossible, for an appellate court to fix a standard by which a trial court must determine the qualifications of a person to give expert opinion upon a given subject. In this instance, the trial court took the view that the two witnesses, by reason of their practical experience in the use of firearms, and their opportunities for observing actual cases in which different kinds of ammunition had been used, were competent to give their opinions in opposition to those expressed by Mr. Collins. For the reasons stated, no substantial error was committed, as set forth in assignments 6 and 7. (See Wigmore on Evidence, secs. 675, 1922.)

The refusal of the court to give the following instructions proposed by the defendant is also said to be error:

"(6) You are instructed that the law does not call upon [7] the defendant in this case to explain his absence or his animosity toward the deceased. The burden is upon the state throughout this case to establish the defendant's guilt beyond a reasonable doubt.

"(7) The jury will bear in mind that the burden of proving that the defendant was present and committed the alleged offense is upon the prosecution, and, if the prosecution has failed to prove the presence and commission of the alleged offense by the defendant beyond a reasonable doubt, then it is your duty to acquit the defendant."

"(14) The court instructs the jury that you have no right to disregard the testimony of the defendant solely on the ground that he is the defendant, and stands charged with the commission of a crime. The law presumes the defendant innocent until he is proven guilty beyond a reasonable doubt, and the law allows him to testify in his own behalf. The jury should fairly and impartially consider his testimony, together with all the other evidence in the case, and if, from all the

evidence, including the testimony of the defendant himself, the jury have any reasonable doubt that the defendant is guilty as charged in the information, then, and in such case, you should give the defendant the benefit of that doubt, and acquit him."

"(16) You are instructed that if, after considering all the evidence in this case, you should entertain a reasonable doubt as to whether the deceased was shot and killed with a soft-nosed bullet, then it is your sworn duty to give the defendant the benefit of such doubt upon that question, and find him not guilty."

"(20) The court instructs the jury that the burden of proving that the defendant was present and participated in the alleged homicide is upon the prosecution, and, if the prosecution fails to prove his presence or participation in the alleged homicide beyond a reasonable doubt, then it is your duty to acquit the defendant."

The reasons given by counsel in their brief were that the foregoing instructions were "predicated upon the defense of alibi, and that the defendant, having introduced evidence tending to establish an alibi, was entirely denied the right to have the same considered by the jury."

The propositions contained in the offered instructions are that the burden of proving that "the defendant was present and participated in the alleged homicide," is upon the state, and if it fails "to prove his presence or participation in the alleged homicide beyond a reasonable doubt, then it is your duty to acquit the defendant." In volume 1 of the third edition of Bouvier's Law Dictionary, we find the following: "Alibi. (Lat. elsewhere) Presence in another place than that described." If, as the defendant's counsel now insist, the defendant's absence from the scene of the homicide at the time of the killing was relied upon as one of his chief grounds of defense, he should have tendered an instruction defining the term "alibi," and so wording it that the jury could not have misunderstood the issue presented for their determina-

tion. The instructions proposed do not present that issue to the jury.

Under our system, it is the duty of counsel to request the court to give such instructions as he desires. If he fails to follow the statute in that respect, this court will indulge the presumption that the issue was not deemed of sufficient moment to warrant its submission to the jury. Any other course would encourage counsel to try his case in the district court upon one theory, and another and distinct theory in this court, and thus produce uncertainty and confusion which would seriously hamper the administration of the criminal law. Had counsel prepared an instruction in writing, defining the term "alibi" for the guidance of the jury in its consideration of the evidence upon that point, as he is required to do by subdivision 4 of section 9271 of the Revised Codes, a different question would arise.

The court, in its instruction No. 7, distinctly told the jury [8] that no person could be convicted of murder unless the death of the person alleged to have been murdered, and the fact of the killing by the defendant, are established as independent acts. In the same instruction it also used this language: "The fact of the killing must be established by direct proof, beyond a reasonable doubt, and the fact that the killing was done by the defendant must be established beyond a reasonable doubt."

The court also defined the term "reasonable doubt" without exception by defendant, and further charged that the defendant was presumed to be innocent, "and particularly of the crime charged," until the crime was proven, and, in case of a reasonable doubt whether his guilt is satisfactorily shown, he should be acquitted. From the entire charge, it is clear to us that the jury must have fully understood that, if they entertained a reasonable doubt as to whether the defendant, at the time of the shooting, was so far away from the scene that he could not have committed the act, the state had failed to prove

his guilt, and that the defendant must be acquitted. By defendant's own admission he was within rifle-shot of the deceased at or near the time of the killing. He left the doorstep of his house with his rifle in his hands, almost immediately returned to the house, hastily gathered up some provisions to take along, and passed out of sight toward the mountains. In our opinion, these conceded facts furnish ample ground for the inference that he assumed a position from which he could see the deceased removing a fence in opposition to his will, and in a spirit of anger, revenge and malice shot him, and without delay went into the mountains, where he stayed for the space of three days.

Appellant's contention that the court erred in giving as its [9] instruction No. 15, a literal copy of section 9282 of the Revised Codes, has no merit. It reads: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." As was said by Chief Justice Brantly in the case of *State* v. *Colbert*, 58 Mont. 584, 194 Pac. 145: "In murder cases, when the killing is proved, the burden shifts to the defendant to adduce evidence tending to show mitigation, excuse, or justification. * * * (Rev. Codes, sec. 9282.) When, therefore, the homicide is established, nothing else appearing, the presumption of innocence is overcome"; and the presumption that a person intends the natural consequences of his voluntary act "comes to the aid of the prosecution and establishes the malicious intent which is a necessary element of the crime, and warrants a verdict finding the defendant guilty of murder. To warrant a finding of murder in the first degree, the prosecution must, of course, establish premeditation and deliberation. (*State* v. *Kuum*, 55 Mont. 436, 178 Pac. 288.) But to establish murder

as defined in our Codes (section 8290), proof of the killing alone is sufficient to make out the case."

Under the circumstances shown in the evidence, there was ample room for the jury to conclude that the defendant killed the deceased. Having established that fact, clearly the burden was then upon the defendant to show circumstances of mitigation. The finding of the jury precludes the suggestion that there were any circumstances tending in any manner to justify or excuse the act. The state was entitled to this instruction and it was not error upon the part of the court to give it.

Error is also claimed because the court struck out and re- [10] fused to consider the affidavits touching the charge that the jury were not kept together during the trial, and their deliberations upon the verdict. To rebut this evidence, each of the twelve jurors, as well as the three bailiffs, under whose charge they were, testified that they were kept together, and not allowed to separate; that they heard no other evidence than that adduced upon the trial; that they did not communicate with any person during the trial, nor misconduct themselves in any manner whatsoever; and that no facts other than those embodied in the evidence upon the trial entered into their consideration of the case. We have carefully considered the evidence upon this question, and are of the opinion that the result would have been the same had the court considered the question on the merits, instead of striking them from the files.

After a painstaking examination of the proceedings in the court below, embracing more than 850 full pages of typewritten matter, and a thorough examination of every legal question argued and suggested in the briefs of counsel, we are satisfied that every debatable ground of error has been urged in defendant's behalf. While we have not discussed all the errors alleged to have been committed, we have carefully considered them all, and are satisfied that every substantial

right of the defendant was respected, and that the verdict and judgment are fully justified by the evidence.

The judgment and order appealed from are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, HOLLOWAY and GALEN concur in the result.

Rehearing denied July 18, 1921.

EVANS ET AL., RESPONDENTS, v. CITY OF HELENA ET AL., APPELLANTS.

(No. 4,894.)

(Submitted July 1, 1921. Decided July 6, 1921.)

[199 Pac. 445.]

Cities and Towns—Special Improvements—Departure from Resolution of Intention—Void Contract—Injunction—Bonds and Warrants—Issuance at Discount Prohibited.

Cities and Towns—Special Improvements—Departure from Resolution of Intention not Permitted.

1. In its resolution of intention to create a special improvement district, the city council must describe the character and nature of the contemplated improvements with sufficient particularity to advise the taxpayer affected, and the improvements to be made must correspond substantially with those set forth in the resolution, and no material change or departure therefrom can be made.

Same—Special Improvements—Material Departure from Resolution of Intention—Injunction.

2. Under a resolution of intention to create a special improvement district for the purpose of paving streets, with the necessary excavations, cutting, filling, *etc.*, and "incidental work," *held* that defendant city was properly enjoined from entering into a contract the provisions of which departed substantially from the purposes set forth in the resolution, in that they included reduction in the street widths and the construction of new parking, curbing and storm sewers, each of which constitutes a distinct city improvement under Chapter 89, Laws of 1913, as amended by Chapter 142, Laws of 1915, and none of which was therefore subject to inclusion under the term "incidental work."

[60 Mont. 577.]

Same—Special Improvement Bonds or Warrants—Issuance at Discount Prohibited.

3. *Held*, under section 26 of Chapter 89, Laws of 1913, that the city council has no power to issue bonds or warrants at a discount, in payment of special improvement work, and that therefore a contract let to one who in making out his bid took into consideration the fact that the warrants he would receive were worth only ninety cents on the dollar, and therefore added ten per cent to the actual cost, was invalid as an attempt to do indirectly what the council was prohibited from doing directly.

Appeal from District Court, Lewis and Clark County; A. J. Horsky, Judge.

ACTION by Bertha M. Evans and others against the city of Helena and others. From an order granting a temporary injunction, defendants appeal. Affirmed.

Mr. E. C. Day, for Appellants, submitted a brief and argued the cause orally.

The decision of the city council that the property of the plaintiffs within the exterior boundaries of the district was specially benefited is binding upon the court in the absence of evidence that the council acted arbitrarily, and in the absence of protests on the ground of nonbenefit. The legislature has conferred upon the city council the power to determine the boundaries of the district and the property especially benefited, and that to be included or excluded. That determination is conclusive upon the court, and those who fail to object to the inclusion of their property cannot afterward be heard to assert that it is not benefited. The district rule is a legislative declaration that all property included in the district is benefited, and that the benefit accrues proportionately unless some fact is shown which takes the plaintiffs' property out of the general class. These principles have been so often asserted and reaffirmed by this court, that a mere citation of the Montana cases ought to be sufficient. (*McMillan* v. *City of Butte*, 30 Mont. 220, 76 Pac. 203; *Power* v. *City of Helena*, 43

---

3. Construction of statute prohibiting sale of municipal bonds for less than par, see note in Ann. Cas. 1913E, 85.

Mont. 336, 36 L. R. A. (n. s.) 39, 116 Pac. 415; *Shapard* v. *City of Missoula*, 49 Mont. 269, 141 Pac. 544; *Mansur* v. *City of Polson*, 45 Mont. 585, 125 Pac. 1002; *Beck* v. *Holland*, 29 Mont. 234, 74 Pac. 410.) The power to lay out, establish, open, alter, widen, extend, grade, pave or otherwise improve streets is lodged entirely in the city council. (Rev. Codes, sec. 3259, subd. 6; Improvement Dist. Law, Laws 1913, Chap. 89, p. 394, Rev. Codes Supp., p. 506.) The power to create special improvement districts for the making of street improvements is also vested in the city council. (Rev. Codes, sec. 3259, subd. 80; Rev. Codes Supp., Vol. 3, p. 507; *Shapard* v. *City of Missoula*, 49 Mont. 269, 141 Pac. 544.) The council having complied with the statutory provisions for creating the district, the objection that the property will not be benefited at all cannot be urged except as to specific lots, where it is shown that the assessment is a flagrant abuse of power, arbitrary in character, and amounts in fact to a confiscation of the particular property. General allegations, such as the complaint contains, are not sufficient. (*French* v. *Barber Asphalt Co.*, 181 U. S. 324, 45 L. Ed. 879, 21 Sup. Ct. Rep. 625; *Houck* v. *Little River Drainage Dist.*, 239 U. S. 254, 60 L. Ed. 266, 36 Sup. Ct. Rep. 58; *Fallbrook Irr. Dist.* v. *Bradley*, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; *Miller & Lux* v. *Sacramento etc.*, 182 Cal. 252, 187 Pac. 1041, 1046; affirmed by Sup. Ct. U. S., April 11, 1921, Adv. Sheets, 474.) If the assessment proves to be arbitrary or confiscatory by reason of any fact, relief can be had by the means set forth in section 17 (Rev. Codes Supp. 516), or, if the council refuses relief, then by appeal to the courts.

The legislature has the power to provide for and compel local improvements, and in the exercise of this power, where opportunity to be heard is given, no constitutional rights are violated. (*Billings Sugar Co.* v. *Fish*, 40 Mont. 256, 20 Ann. Cas. 264, 26 L. R. A. (n. s.) 973, 106 Pac. 565.) In the absence of any showing of fraud or arbitrary conduct on the part of the city council, its findings, by the passage of the reso-

lution creating the district that the property included in the district has been benefited, is conclusive. To permit evidence of value of benefits, or salability or nonsalability of property, would be to substitute the court's opinion for that of the city council. (*Brougham* v. *Kansas City*, 263 Fed. 115.) Failure of the property owner to object to the inclusion of his property in the district waives the objection and makes the decision of the city council final. (*Duncan* v. *Ramish*, 142 Cal. 686, 76 Pac. 661; *City of Denver* v. *Dumars*, 33 Colo. 94, 80 Pac. 114; *Brown* v. *Drain*, 187 U. S. 635, 47 L. Ed. 343, 23 Sup. Ct. Rep. 842; affirming the decision of the circuit court of appeals, 112 Fed. 582, and *King* v. *Portland*, 184 U. S. 61.)

Persons whose property is included in the district cannot be heard to object that property which might have been benefited has been excluded. (*Minnesota & M. Land & Imp. Co.* v. *City of Billings*, 111 Fed. 972, 50 C. C. A. 70.) The objection is also waived by failure to raise it by protest. (*Spalding* v. *City of Denver*, 33 Colo. 172, 80 Pac. 126.) It will be noted that the area of the property of the plaintiffs is less than eight (8) per cent of the total area of the property included in the district. To hold that this percentage of objecting property can invoke the court to set aside the creation of the district on the ground that their property is not specially benefited would be to permit the courts to destroy the legislative expression of the city council at the request of a percentage of the property affected, which would not be sufficient in area to require such a decision by the city council when applied to directly by a like area.

Evidence that property other than that of the plaintiffs will not be benefited is not admissible. No one can be heard to question the validity of a statute, or the action of a governmental agency unless, and except as, his interests have been or are about to be injured by the threatened action. (*Barth* v. *Pock*, 51 Mont. 418, 155 Pac. 282.)

That the property of the plaintiffs will not be increased in salable value by an amount substantially equal to the cost of

the improvement, the proportionate amount of which is to be assessed against the property, is not of itself sufficient to constitute a taking of property without compensation or to result in depriving the owner of it without due process of law. (*City of Kalispell* v. *School Dist.*, 45 Mont. 221, Ann. Cas. 1913D, 1101, 122 Pac. 742; *Louisville & N. R. Co.* v. *Barber Asphalt Paving Co.*, 197 U. S. 430, 49 L. Ed. 819, 25 Sup. Ct. Rep. 466.)

An especially interesting case is that of *Miller & Lux* v. *Sacramento etc. Drainage Dist.*, 182 Cal. 252, 187 Pac. 1041, where land which had already been reclaimed from its swamp condition was included in a drainage district which also sought to effect flood control over a large area.

No fact was shown at the hearing which would justify the conclusion that the property of the plaintiffs had been arbitrarily or improperly included in the district, or that there is any reason for setting aside the presumption that their property would share ratably in the benefits to accrue to a city residence district from the making of an improvement such as that proposed. (*Mount St. Mary's Cemetery* v. *Mullins*, 248 U. S. 501, 63 L. Ed. 383, 39 Sup. Ct. Rep. 173.)

The district being lawfully created, the method of paving the street is within the discretion of the city council, which will not be controlled by the courts except for abuse of such discretion.

In states where the city council is given power "to lay out, establish, open, alter, widen, grade, pave or otherwise improve" streets, as is the case in Montana (Rev. Codes, sec. 3259, subd. 6), it has been frequently held that the city council has the power to fix the width of the pavement, put a strip of parking in the center, and exercise general powers over the width of its traveled ways. (McQuillin on Municipal Corporations, sec. 1835; *City of Mt. Carmel* v. *Shaw*, 155 Ill. 37, 46 Am. St. Rep. 311, 27 L. R. A. 580, 39 N. E. 584; *West Chicago etc. Commrs.* v. *Farber*, 171 Ill. 146, 49 N. E. 427; *Thompson* v. *City of Highland Park*, 187 Ill. 265, 58 N. E. 328; *Bekkedahl*

v. *Westby*, 140 Wis. 230, 122 N. W. 727; *Downing* v. *Des Moines*, 124 Iowa, 289, 90 N. W. 1066; *Kittinger* v. *City of Buffalo*, 148 N. Y. 332, 42 N. E. 803; *Fuller* v. *City of Grand Rapids*, 105 Mich. 529, 63 N. W. 530.) The changing of the width of the paved highway is not a discontinuance of a street, but a change in the character of the public use, which is entirely within the control of the council. (*Bekkedahl* v. *Westby; City* v. *Shaw, supra.*) There are only two limitations upon the exercise of the power, namely, that the improvement when made must not be materially different from that described in the resolution of intention, and the cost must not be materially increased. (*Mansur* v. *City of Polson, supra.*)

The contract is not invalid because the price exceeds the original estimate. (*Mellen* v. *City of Glenwood* (Iowa), 176 N. W. 373.)

The contract does not provide for the bonds to be received at less than their face value. The law requires the contractor to accept the bonds at their face value in payment for work done, and prohibits the council from delivering bonds under any other terms. That the bidder took into consideration his ability to sell the bonds, the amount to be realized, the difference in rates of interest on money borrowed, and the readiness with which the bonds could be disposed of, in determining the amount in cash which it would cost him to do the work, as testified to by Thomson, is a natural inference, and one which the law contemplated. It is a condition which arises in the case of every letting, and the elements which enter into the value of the work or the cost of doing it varies with each bidder. And yet, the legislature has not seen fit to provide for a sale of the bonds by the city, in lieu of a delivery to the contractor, as is provided in section 26 of the Act, in the case of bonds issued in payment of property taken by the city. The statutory prohibition is "that no warrants or bonds shall be delivered or received in payment of a less sum than its face value." There is nothing in the evidence

to warrant the assumption that this provision has been or will be violated.

Mr. C. B. Nolan, Mr. Wm. Scallon and *Mr. A. W. O'Rourke,* for Respondents, submitted a brief; *Mr. Nolan* argued the cause orally.

The resolution of intention and the giving of the notice are jurisdictional. (*Cooper* v. *City of Bozeman,* 54 Mont. 277, 169 Pac. 801; *Kohn* v. *City of Missoula,* 50 Mont. 75, 144 Pac. 1087; *Shapard* v. *City of Missoula,* 49 Mont. 269, 141 Pac. 544; *Harvey* v. *Town of Townsend,* 57 Mont. 407, 188 Pac. 897; *Hinzeman* v. *City of Deer Lodge,* 58 Mont. 369, 193 Pac. 395; *Mansur* v. *City of Polson,* 45 Mont. 585, 125 Pac. 1002; *Allen* v. *City of Butte,* 55 Mont. 205, 175 Pac. 595; *Boyle* v. *City of Butte,* 55 Mont. 209, 175 Pac. 596.)

Necessity for describing with some particularity nature of improvements. (*Mansur* v. *City of Polson,* 45 Mont. 585, 125 Pac. 1002; *Pacific Paving Co.* v. *Verso,* 12 Cal. App. 362, 107 Pac. 590; *Bay Rock Co.* v. *Bell,* 133 Cal. 150, 65 Pac. 299; *Cass* v. *People ex rel. Kochersperger,* 166 Ill. 126, 46 N. E. 729, 47 N. E. 368; *Sanger* v. *City of Chicago,* 169 Ill. 286, 48 N. E. 309; *Lambert* v. *Cummings,* 2 Cal. App. 642, 84 Pac. 266; *Fay* v. *Reed,* 128 Cal. 357, 60 Pac. 927; *City of Geneseo* v. *Brown,* 250 Ill. 165, 95 N. E. 172; *City of Kirksville* v. *Coleman,* 103 Mo. App. 215, 77 S. W. 120; *Ladd* v. *Spencer,* 23 Or. 193, 31 Pac. 474; *Schwiesau* v. *Mahon,* 128 Cal. 114, 60 Pac. 683; *Smith* v. *City of Chicago,* 214 Ill. 155, 73 N. E. 346; *Buckley* v. *City of Tacoma,* 9 Wash. 256, 37 Pac. 441.) No plans or specifications whatever had been prepared prior to the creation of the district. The only information given to the owners was that which could be derived from the resolutions themselves. If the information thus given should be held sufficient under the law to validate the resolutions, then the city authorities should be held, with reasonable strictness, to the observance of the rule against material changes or departures in plans and in the nature of the work. Otherwise, owners would ofttimes be left helpless.

Improvements made must correspond substantially with those set forth in the resolution of intention, and no material change can be made. In the instant case material changes have been made. (*Mansur* v. *Polson*, 45 Mont. 594, 125 Pac. 1002; *McBean* v. *Redick*, 96 Cal. 191, 31 Pac. 7; *Mason* v. *City of Sioux Falls*, 2 S. D. 240, 39 Am. St. Rep. 802, 805, 51 N. W. 774; *Piedmont* v. *Allman*, 136 Cal. 88, 68 Pac. 493; *Partridge* v. *Lucas*, 99 Cal. 519, 33 Pac. 1082; *La Franchi* v. *City of Seattle*, 78 Wash. 158, 138 Pac. 659; *Jones* v. *Barber A. P. Co.*, 174 Mo. 393, 160 S. W. 279; *San Jose Co.* v. *Auzerais*, 106 Cal. 498, 39 Pac. 859.)

Each kind of improvement specified in statute constitutes a class or a specific and distinct improvement. Any or many or all may be included in one resolution, but any intended to be done must be included. (*Piedmont Paving Co.* v. *Allman*, 136 Cal. 88, 68 Pac. 493; *Partridge* v. *Lucas*, 99 Cal. 519, 33 Pac. 1082; *Himmelmann* v. *Satterlee*, 50 Cal. 68; *Beaudry* v. *Valdez*, 32 Cal. 270; *Donnelly* v. *Howard*, 60 Cal. 291; *Mason* v. *City of Sioux Falls*, 2 S. D. 240, 39 Am. St. Rep. 802, 805, 51 N. W. 774.) In the instant case drainage sewers and parkings were not mentioned in resolutions. Where streets are referred to in the resolutions, the words mean entire width of street.

The result and benefit must bear a just proportion to the burden imposed. (*City of Butte* v. *School District No. 1*, 29 Mont. 336, 74 Pac. 869; *Stadler* v. *City of Helena*, 46 Mont. 128, 127 Pac. 454; 25 Ruling Case Law, "Special or Local Assessments," sec. 56, p. 138; *City of Detroit* v. *Chapin*, 112 Mich. 588, 42 L. R. A. 638, 71 N. W. 149; *Chicago* v. *Blair*, 149 Ill. 310, 24 L. R. A. 412, 36 N. W. 829; *Power* v. *City of Helena*, 43 Mont. 336, 36 L. R. A. (n. s.) 39, 116 Pac. 415.) They may be the subject of judicial inquiry, and determination of council not entirely conclusive. (*Beck* v. *Holland*, 29 Mont. 234, 74 Pac. 410.) The value of the property in the district, and, in particular, the property of the plaintiffs, will not be benefited, or, if benefited, it will not be in excess of twenty-

five per cent of the costs of the improvements. There is in the case as presented no dispute as to this. Therefore, there is a loss and damage to the plaintiffs to the extent of seventy-five per cent or more of the cost of the improvements. We contend that there is a right to a judicial hearing on the question of benefits and costs and to prevent the confiscation of property.

The lots excluded from the district will receive benefits from the improvements of the same nature as will the lots included. Their exclusion was illegal. (*Beck* v. *Holland,* 29 Mont. 234, 74 Pac. 410.)

The contract price is in excess of estimate. (*City of Chehalis* v. *Cory,* 54 Wash. 190, 102 Pac. 1027, 104 Pac. 768.)

The warrants will be issued at less than par if the contract stands. The members of the city council understood, at the time they passed upon the bids and accepted the bid of McHugh, that the last-mentioned bid, as well as the other bids, was based upon an assumed depreciation or discount of ten per cent or more of the face of the district warrants and bonds to be issued as compensation for the work, and that the amount of the various bids was inflated by a corresponding percentage; so that the district in reality would not get par for such bonds or warrants, although in appearance they might be issued at par because of the inflation of the amount of the bid. In connection with this, reference is made to the provision of section 26 prescribing that bonds or warrants when sold shall not be sold for less than par, and the provision of said section that warrants or bonds when issued in payment of work done must not be issued at less than face. Our point is that the legislative policy is clearly declared by these provisions, and they cannot be evaded by indirection.

Opinion—PER CURIAM.

Action was brought to procure an injunction restraining defendants from entering into a contract with one Frank J. McHugh for paving streets within improvement district No. 125

within the city of Helena. Upon filing complaint, application was made for a temporary injunction, which was granted. Defendants have appealed from the order granting the temporary injunction.

On the second day of March, 1920, the council of the city [1] of Helena passed a resolution of intention to create the improvement district; the portions of the resolution of importance to the issues here involved being as follows: "That it is the intention of the city council of the City of Helena to create a special improvement district, to be known and designated as special improvement district No. 125, for the purpose of paving with reinforced concrete pavement, with the necessary excavations, cutting, filling, grading, curbing, and incidental work therewith and therefor. * * * The general character of the improvements to be made in said district is to pave the above named streets with reinforced concrete paving, six inches thick, together with the necessary excavating, cutting, filling, grading, curbing, and incidental work therewith and therefor, under specifications to be adopted by the city council of the City of Helena. * * * That the approximate estimate of costs of said improvements, including the clerical work, engineering, and supervision, is the sum of $340,000."

The streets within the improvement district vary in width from thirty-one to forty-one feet. There are parking and curbing on these streets, which have heretofore been installed under proceedings in other special improvement districts at the expense of the property owners. There is nothing in the resolution of intention to install storm sewers, extend the parking, or to completely tear out the old curbing and install new curbing. Subsequently the district was created, advertisement for bids for the construction of proposed improvement was made, and the bid of Frank J. McHugh was accepted at the sum of $349,543.34. The plans and specifications upon which the bids were made involved the construction of storm sewers in the streets covered by the pavement, pavement of the streets to the width of twenty-five feet, the tearing out of the

old curbing in its entirety, and the installation of new curbing and extension of the parking on each side of the proposed pavement from the line of the present curbing to the line of the proposed new curbing. Under the proposed contract the contractor will be paid by district warrants. John D. McLeod and John Dryburgh, two of the city commissioners, testified relative to the value of the warrants as reflected in the price for the work. Mr. McLeod testified that, in connection with the consideration of the bids and as to whether or not they were reasonably fair in amount, he considered the depreciated value of the warrants, and that he considered such value on the basis of ten per cent discount and awarded the contract on that basis. Mr. Dryburgh testified that he had reason to believe that the warrants would be disposed of by the contractor at less than par, and that if he had known that these warrants were worth cash he would not have been disposed to accept the offered bids as reasonable, and that the council certainly would have gotten a better bid if the warrants could have been sold at par. One John Tripp also testified that he was a bidder for the contract, and that in making his bid he did it on the basis that the warrants would be worth only ninety cents on the dollar. This constituted all the testimony on this feature of the case.

These facts present two questions for our determination the decision of which will dispose of the case: (1) In letting the contract, was there a substantial departure from the improvements set forth in the resolution of intention? (2) Is it permissible for the city to enter into a contract whereby payment for services to be rendered shall be made by warrants at a depreciated valuation? Other reasons were urged in support of plaintiffs' contention that the making of the contract should be enjoined, but it will be unnecessary to consider such other contentions.

In this case no question as to jurisdiction arises, there being no contention made respecting the legality of the creation of the paving district. In fact, it is conceded that the district

was legally created; but the proceedings subsequent to the organization of the district are the subject of attack, primarily the McHugh contract, which is made the basis of this decision.

The record clearly discloses that the plans and specifications for the paving, and proposed contract with Frank J. McHugh for the execution of the work, departed materially from the resolution of intention and that creating the district. The resolution of intention gave no indication that there would be a reduction in the width of the paving of the streets from the existing street widths between present curbs, or that new parking or parking extension was in contemplation, or that there would be a destruction or replacement of street curbing or new curbing, or that the installation of storm sewers was a part of the proposed improvements. However, it is contended by counsel for the defendants that all such changes and additions were legally warranted by virtue of the use of the words "incidental work" contained in the resolution of intention, and that the judgment and discretion vested in the city council in dealing with the subject for the best interest and advantage of the city authorizes the inclusion of such additional improvements.

Section 3, Chapter 89, of the Laws of 1913, as amended [2] by section 2 of Chapter 142, Laws of 1915, provides in part as follows: "Before creating any special improvement district, for the purpose of making any of the improvements, or acquiring any private property for any purpose authorized by this Act, the city council shall pass a resolution of intention so to do, which resolution shall designate the number of such district, describe the boundaries thereof, and state therein, *the general character of the improvement or improvements* which are to be made, and an approximate estimate of the cost thereof." It would require a very strained construction of language to hold that "incidental work" to paving, by implication, includes the several subjects embraced in the contract, each of which constitutes a class or a distinct city

improvement. (See Chapter 89, Laws 1913, as amended by Chapter 142 of the Laws of 1915.)

That "incidental work" is not a sufficient description of "the general character of the improvement or improvements" in the resolution of intention is manifest. From the resolution of intention and notice given to the taxpayers affected in connection with the creation of improvement district No. 125, no one can reasonably be held to have been advised by the general designation of paving and "incidental work" that any improvement other than the paving of the streets was designed or intended, for within the district large portions of territory have already been included in parking, curbing, and sewer districts.

Pertinent to the case before us, it was well stated by Mr. Chief Justice Brantly, in his dissenting opinion in the case of *Mansur* v. *City of Polson,* 45 Mont. 596, 125 Pac. 1002, as follows: "The term 'character,'" as used in the statute, "is perhaps the most general that could have been employed. Even so, it must be assigned such a meaning as will effectuate the purpose had in view, *viz.*, that the improvement be so described by a statement of the dimensions, materials, *etc.*, that the lot owner may determine whether he will acquiesce, and thus consent, or appear at the appointed time and seek to arrest further proceedings. He ought not to be compelled to suffer inconvenience incident to leaving his business to seek, and make an inquiry of, members of the council or of the officer or officers who will have charge of the contemplated improvement. It is entirely possible that in a given case such inquiry would be futile, because definite information could not be obtained from any one of these officers. Indeed, this was the case here; for the record shows that the city engineer did not submit an estimate of the cost of the improvements or prepare plans and specifications until after the time for making objections had passed."

It is the established rule of law that the city council, in the resolution of intention, must describe the character and

nature of the improvements, with sufficient particularity in order that the taxpayers affected may be fully advised, and the improvements to be made must correspond substantially with those set forth in the resolution of intention and no material change or departure therefrom can be made. (*Mansur* v. *City of Polson*, 45 Mont. 585, 125 Pac. 1002; *Clay* v. *City of Grand Rapids*, 60 Mich. 451, 27 N. W. 596; *Peck* v. *City of Grand Rapids*, 125 Mich. 416, 84 N. W. 614; *McBean* v. *Redick*, 96 Cal. 191, 31 Pac. 7; *Mason* v. *City of Sioux Falls*, 2 S. D. 640, 39 Am. St. Rep. 802, 805, 51 N. W. 770; *Piedmont* v. *Allman*, 136 Cal. 88, 68 Pac. 493; *Partridge* v. *Lucas*, 99 Cal. 519, 33 Pac. 1082; *La Franchi* v. *City of Seattle*, 78 Wash. 158, 138 Pac. 659; *Jones* v. *Barber A. P. Co.*, 174 Mo. 393, 160 S. W. 279; *San Jose Co.* v. *Auzerais*, 106 Cal. 498, 39 Pac. 859; *Pacific Paving Co.* v. *Verso*, 12 Cal. App. 362, 107 Pac. 590; *Bay Rock Co.* v. *Bell*, 133 Cal. 150, 65 Pac. 299; *Cass* v. *People ex rel. Kochersperger*, 166 Ill. 126, 46 N. E. 729; *People ex rel. Kochersperger* v. *Hurford*, 167 Ill. 226, 47 N. E. 368; *Sanger* v. *City of Chicago*, 169 Ill. 286, 48 N. E. 309; *Lambert* v. *Cummings*, 2 Cal. App. 642, 84 Pac. 266; *Fay* v. *Reed*, 128 Cal. 357, 60 Pac. 927; *City of Geneseo* v. *Brown*, 250 Ill. 165, 95 N. E. 172; *City of Kirksville* v. *Coleman*, 103 Mo. App. 215, 77 S. W. 120; *Ladd* v. *Spencer*, 23 Or. 193, 31 Pac. 474; *Schwiesau* v. *Mahon*, 128 Cal. 114, 60 Pac. 683; *Smith* v. *City of Chicago*, 214 Ill. 155, 73 N. E. 346; *Buckley* v. *City of Tacoma*, 9 Wash. 256, 37 Pac. 441.)

"These proceedings have for their ultimate purpose the subjecting of the property within the district to taxation to bear the cost of the improvements. They are *in invitum*, and in recognition of these facts the legislature has provided a complete, but direct, plan of procedure designed to protect property from confiscation and at the same time permit beneficial improvements to be made." (*Johnson* v. *City of Hardin*, 55 Mont. 574, 179 Pac. 824; see, also, *Hinzeman* v. *City of Deer Lodge*, 58 Mont. 369, 193 Pac. 395.)

[60 Mont. 577.]

As is well stated by Mr. Chief Justice Campbell in *Clay* v. *City of Grand Rapids, supra*: "If a city council can do one thing and call it something else, so as to confound roads with sewers, and the repair of one with the building of the other, there is no safety to citizens against the grossest usurpations and injustices."

Any one or all of the several improvements contemplated may be included in the resolution of intention, but each separate character of improvement must be embraced by specific mention and at least a general description. (Sec. 2, Chap. 142, p. 343, Laws 1915; *Piedmont Paving Co.* v. *Allman, supra; Partridge* v. *Lucas, supra; Himmelmann* v. *Satterlee,* 50 Cal. 68; *Beaudry* v. *Valdez,* 32 Cal. 270; *Donnelly* v. *Howard,* 60 Cal. 291; *Mason* v. *City of Sioux Falls, supra.*)

Ordinarily the courts will not interfere with the judgment and discretion vested in the city council in the making of such street improvements, where it acts within jurisdiction and the resolution of intention and notice sufficiently describe the work and improvements contemplated; but where the improvements about to be made are essentially different from those authorized by the resolution, and the cost of the same is materially increased, the courts will interfere, although as regards the work to be done a substantial compliance with the resolution is all that is necessary. (Hamilton on Law of Special Assessments, secs. 391, 392; *Mansur* v. *City of Polson, supra.*)

Section 26 of the Act (Laws 1913, Chap. 89, p. 411) declares: "Whether provided in the call for proposals or not, [3] all warrants let under the provisions of this Act shall be payable in bonds or warrants issued under the provisions hereof, and the city council may provide by contract with the person, persons or corporation doing the work or making the improvement for the payment of which such warrants or bonds are issued, to deliver the said warrants or bonds in installments as the work progresses, or upon the entire completion thereof:

Provided, however, that no warrants or bonds must be delivered to such contractor or contractors in excess of the amount of the work actually done at the time of the delivery, nor shall the total amount issued be in excess of the total cost and expense of the said improvements, and no warrants or bonds shall be delivered or received in payment of a less sum than its face value. And when it becomes necessary to pay for private property taken for the opening, widening or extending of any street, avenue or alley, or to pay any amount awarded or recovered on account of damages to any property caused by the making of any improvements in money, in cases where the person whose property is so taken or damaged refuses to receive his pay in warrants or bonds, then the council shall have the power, under such regulations as it may prescribe, to sell such bonds or warrants for not less than par, and devote the moneys derived therefrom to the payment of the damages assessed or agreed upon for such property or the damages thereto." This provision is crudely and awkwardly expressed. It requires no argument, however, to sustain the proposition that the fundamental idea in the mind of the legislature in enacting it was that the city council should not have power under any circumstances, directly or indirectly, to issue bonds or warrants of the district at a discount, but, on the contrary, that the price at which they should be issued and delivered for any work should be measured by the actual cost of it in cash. This is made clear by the expressions found in the proviso; *i. e.*: "No warrants or bonds must be delivered to such contractor or contractors in excess of the amount of the work actually done at the time of the delivery, nor shall the total amount issued be in excess of the total cost and expense of the said improvements," and "no warrants or bonds shall be delivered or received in payment of a less sum than its face value."

If we keep in mind the fact that section 25, as amended (Laws 1915, p. 340), expressly provides that the rate of interest upon the bonds or warrants of the district shall not exceed

six per cent per annum, it becomes manifest that the legislature intended to prohibit the council from paying for any work in bonds or warrants which cannot, at the time of the delivery, be sold upon the market for their face value. In thus limiting the rate of interest to six per cent, the legislature evidently entertained the idea that the condition of the market for bonds or warrants of the description under consideration would sometimes be such that there would be no sale for them, except at a discount, and therefore that while this condition should exist, cities should not be allowed to install improvements of any kind, the purpose being to prevent extravagance and waste. That this is the correct view is further emphasized by the provision in the latter part of section 26, *supra*, allowing the council the alternative of paying damages for property taken or damaged in making any improvement by delivering bonds or warrants of the district to the owner of the property or, in case he refuses to accept them, to sell them in the market for not less than par and pay him in cash.

Counsel for city insists that inasmuch as the proposed contract will call for the payment of the price of the improvement in bonds or warrants at their face value, this amounts to a strict compliance with the requirement of the statute. In other words, he says that the statute contemplates that bonds or warrants of any improvement district will, at times, be worth less in the market than their face value, and therefore that, inasmuch as the contractor proposes to take the bonds or warrants at their face value for the work done, though in making out his bid he made an allowance for a discount of ten per cent, the statute will not, in fact, be violated. It is clear, however, that it will be as much a violation of the statute for the city council to contract to pay $100 in bonds or warrants for work which costs only $90, as it is for the council to pay $110 for work that costs only $100. Here the proposed price for paving the streets and doing the incidental work was fixed at $349,543.34. This was arrived at by the

contractor by adding to the actual cost ten per cent because the warrants he expected to receive would, in view of the condition of the market, sell for only ninety cents on the dollar. The council intended to let the contract, fully understanding the basis upon which the contractor made his calculation. Any way the proposed contract may be viewed, the result will be an agreement by the council to issue and deliver the bonds or warrants of the district at a discount. It amounts to an agreement to do indirectly that which the council is expressly prohibited from doing directly. Therefore there will be a clear violation of the statute, and the second question, stated *supra*, must be answered in the negative.

For the reasons stated, a temporary injunction was properly issued by the trial court, enjoining and restraining the defendants from entering into the proposed contract with McHugh, and the order is affirmed, though modified to conform to this opinion.

STATE, RESPONDENT, *v.* DUCOLON, APPELLANT.

(No. 4,819.)

(Submitted September 12, 1921. Decided September 26, 1921.)

[201 Pac. 267.]

Criminal Law—Receiving Stolen Property—Venue—Evidence—Insufficiency.

Receiving Stolen Property—Venue—Proof Required.

1. In a prosecution for receiving stolen property, the state must prove the venue as laid in the information, by evidence which establishes the fact beyond a reasonable doubt.

Same—When Crime Complete and Venue Fixed.

2. When property is received with knowledge that it was stolen, and with the criminal intent defined by the statute, the crime is complete and the venue fixed.

---

1. Quantity of proof necessary to establish venue in criminal prosecution, see note in Ann. Cas. 1912B, 939.

2. What constitutes crime of receiving stolen property, see note in 26 Am. Dec. 261.

[60 Mont. 594.]

Same—Venue—*Corpus Delicti*—Circumstantial Evidence—When Sufficient.

3. The venue as well as the *corpus delicti* in a prosecution for receiving stolen property may be established by circumstantial evidence, provided the criminatory circumstances proved are consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis.

Same—Venue—Evidence—Insufficiency.

4. In the absence of direct evidence showing that defendant, who was found in the possession of stolen cattle in a county other than the one in which he was charged with having received them, came into their possession in the county in which the venue was laid, and of circumstantial evidence sufficient to meet the requirements of the rule above (par. 3), the trial court was without jurisdiction to render a judgment of conviction.

Criminal Law—Evidence—Preponderance Insufficient.

5. In criminal law the doctrine of bare preponderance of evidence has no place.

Appeals from District Court of Meagher County; E. H. Goodman, Judge.

ARTHUR DUCOLON, charged with knowingly receiving stolen property, was convicted and appeals from the judgment and from an order denying his motion for a new trial. Reversed and remanded.

Mr. M. F. Canning, for Appellant, submitted a brief and argued the cause orally.

Mr. Wellington D. Rankin, Attorney General, and *Mr. L. A. Foot,* Assistant Attorney General, for Respondent, submitted a brief; *Mr. Foot* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The defendant was convicted of the crime of receiving stolen property knowing the same to have been stolen, and appealed from the judgment and from an order denying his motion for a new trial.

The principal contention made is that the evidence is insufficient to sustain the conviction. In 1916, Maggie J. Jenkins owned the White Cabin ranch, in Meagher county, and owned

and kept on the ranch some seventy-six head of cattle, including ten unbranded yearlings. She employed W. D. Brodock to feed and care for these cattle from early in January to about April 8, 1916. Mrs. Jenkins lived with her husband on another ranch about four miles distant, and when, on March 13, she visited the White Cabin ranch, she observed that her cattle were then all present. About April 8 Brodock quit the employment and left the ranch. On April 13, when Mrs. Jenkins again visited her ranch, she discovered that some twenty of her cattle, including the ten yearlings, were missing. Investigation disclosed that the missing cattle had been driven through a gate in the inclosure where the cattle had been confined and taken away. The tracks were followed to the ranch of the defendant in Meagher county, where the surrounding circumstances indicated that the cattle had been branded. The tracks were then followed to the Hole in the Rock ranch, in Cascade county, where these ten yearlings, each bearing a recent brand, were found on April 19, 1916, by the sheriff of Meagher county, his deputy and John W. Jenkins, the husband of the prosecuting witness. The defendant was there present also and, in response to an inquiry by the sheriff, claimed that he owned the ten yearlings in question. When he was thereafter immediately arrested, he apparently became confused or scared, and asserted that W. D. Brodock was interested in the cattle with him. When confronted by Jenkins, who up to that time had remained in the background, defendant disclaimed any ownership of or interest whatever in these yearlings. The Hole in the Rock ranch was owned by Oliver Brodock but was then under lease to W. D. Brodock, his son. So far as disclosed by the record, the Ducolon ranch was unoccupied. The defendant was at the Hole in the Rock ranch under some tentative arrangement with W. D. Brodock for a partnership but which did not materialize as the ranch was sold by its owner.

The foregoing is a fair summary of the evidence so far as it relates to the defendant's connection with the cattle in question. W. D. Brodock was charged with stealing the ten yearlings, was tried and convicted and the judgment affirmed by this court. (*State* v. *Brodock*, 53 Mont. 463, 164 Pac. 658.) [1, 2] The information before us charges that this defendant received or came into possession of these cattle in Meagher county, and it became incumbent upon the state to prove the venue, as thus laid, by evidence which established the fact beyond a reasonable doubt (*State* v. *Keeland*, 39 Mont. 506, 104 Pac. 513), for the rule is settled that when property is received with knowledge that it has been stolen and with the criminal intent defined by the statute, the crime is complete and the venue fixed. (*State* v. *Pray*, 30 Nev. 206, 94 Pac. 218.)

There is not any direct evidence that defendant received [3, 4] or came into possession of the cattle in Meagher county, or that he was in Meagher county at any time after March 13, when the cattle were present at the White Cabin ranch, until April 19, when he was returned there by the sheriff under arrest. It is true that in cases of this character the venue, and as well the *corpus deliciti*, may be established by circumstantial evidence, but the rule is settled in this jurisdiction that "where a conviction is sought upon circumstantial evidence, the criminatory circumstances proved must be consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis." (*State* v. *Woods*, 54 Mont. 193, 169 Pac. 39.) Whatever else may be said of the evidence before us, it fails to measure up to this standard.

In his brief, the attorney general suggests that the evidence is stronger in support of the contention that defendant received the cattle in Meagher county than that he received them in Cascade county. If this much be granted for the sake of argument, it does not aid the state's case. The fact that the

crime was committed in Meagher county must be established beyond a reasonable doubt, that is, by evidence which excludes [5] the idea that it was committed in Cascade county. The doctrine of bare preponderance of evidence has no place in the practice of criminal cases.

The other questions raised need not be considered, for, in the absence of evidence establishing the venue as laid in the information, the trial court was without jurisdiction to render this judgment.

The judgment and order are reversed and the cause is remanded to the district court of Meagher county for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS and COOPER concur.

MR. JUSTICE GALEN, being absent, takes no part in the foregoing decision.

STATE, RESPONDENT, *v.* McILWAIN, APPELLANT.

(No. 4,831.)

(Submitted September 13, 1921. Decided October 3, 1921.)

[201 Pac. 270.]

Criminal Law—Rape—Evidence—Insufficiency.

1. Where, in a prosecution for rape, the testimony of the prosecuting witness was so unnatural, unreasonable and improbable as to render belief impossible, a physician expressing the opinion that her story as to what occurred was impossible under any circumstances, and there was other testimony impeaching her and tending to show that defendant lacked opportunity to commit the crime, judgment of conviction reversed with direction to dismiss the cause and discharge defendant. (MR. JUSTICE REYNOLDS dissenting, being of opinion that a new trial should be ordered.)

Appeal from District Court, Blaine County; Frank E. Carleton, Judge.

[60 Mont. 598.]

ROBERT JAMES MCILWAIN was convicted of the crime of rape, and appeals from an order denying his motion for a new trial. Reversed and remanded, with directions to dismiss the prosecution and discharge the defendant.

Mr. David J. Ryan and *Messrs. Freeman & Thelen*, for Appellant, submitted a brief; *Mr. Jas. W. Freeman* argued the cause orally.

Mr. Wellington D. Rankin, Attorney General, and *Mr. L. A. Foot*, Assistant Attorney General, submitted a brief; *Mr. Foot* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant was convicted of the crime of rape committed upon a girl under the age of eighteen years. He has appealed from an order denying his motion for a new trial. He relies for reversal upon several assignments of error, the principal one being that the verdict is contrary to the evidence. As we have concluded that the court erred in overruling the motion on this ground, it will not be necessary for us to consider any of the other assignments.

We shall not set out the details of the story told by the prosecutrix, because they are so revolting and disgusting that they would serve only to offend the sensibilities of the intelligent reader. It will be sufficient to say that, taken as a whole, the story is, in our opinion, so wholly unworthy of credit that, standing alone, it ought not to be accepted as true by any reasonable person.

Besides the testimony of other witnesses tending to im- [1] peach the prosecutrix and to show that the defendant could not have committed the act charged, because there was no opportunity for him to do so, Dr. O'Malley, called in as a medical expert, who had made physical examination of the prosecutrix within forty-eight hours after the time when the

act was alleged to have been committed, expressed the opinion that, in the light of what he observed at the time he made his examination, her story as to what occurred was impossible under any circumstances. What was said by this court in *State* v. *McMillan*, 20 Mont. 407, 51 Pac. 827, a case of the character similar to this, is in point and is entirely applicable to this case:

"It is the well-settled general rule of law, especially in this jurisdiction, that a verdict will not be disturbed when there is simply a conflict in the evidence,—where there is evidence sufficient to support the verdict. But this record does not present simply a conflict in the evidence. It is insisted that the uncorroborated evidence of the prosecutrix, upon which the conviction was had, is so unreasonable, unsatisfactory and contradictory as to unavoidably leave in the mind of any impartial person a reasonable doubt, when considered from a legal standpoint. When testimony is flatly and positively contradicted, there may be said to be a conflict in the evidence. But when the testimony is not only flatly contradicted, but appears to be so unnatural, improbable and unreasonable as to render belief impossible, it is more than a simple conflict, and must necessarily leave in the mind of an impartial, deliberate and intelligent person a reasonable doubt. Viewing evidence from a legal standpoint, we are of the opinion that we have just this kind of a case presented by this appeal."

We are therefore of the opinion that not only should the order be reversed, but that the cause should be remanded to the lower court with directions to dismiss it and discharge the defendant. It is so ordered.

Reversed.

ASSOCIATE JUSTICES COOPER and GALEN concur.

MR. JUSTICE HOLLOWAY: The story told by the prosecuting witness is so inherently improbable that it is unworthy of

credence. For this reason alone I concur in the reversal of the order.

MR. JUSTICE REYNOLDS: I concur in the reversal of the order, but think the case should be sent back for a new trial by reason of prejudicial error in the exclusion of evidence. I cannot concur in the majority opinion to the effect that the story of the complaining witness is so unnatural and improbable that there was nothing substantial to be passed upon by the jury. I am satisfied that one feature of her narrative as to what took place cannot be believed; but the undisputed facts show corroboration of her statements by a general laxity of conduct on the part of all concerned and by the fact that she was the only one of the party of six who registered for a room in the hotel on the night in question, while her evidence showed opportunity for the commission of the criminal act and, in general, was a reasonable and consistent statement of alleged events. It is not within the province of this court to hold that no substantial foundation exists for the verdict, unless her story is so inherently improbable, or is so nullified by contradictions, that no fair-minded person can believe its substance. Even though she was guilty of falsehood in a part of her testimony, it does not necessarily follow that the crime was not committed or that she, as a matter of law, ought to be held unworthy of credit. These are questions for the jury. (*State* v. *Gaimos*, 53 Mont. 118, 162 Pac. 596.) In my opinion, the portion of her story which the members of this court conceive to be unquestionably false might be accepted by the jury as false, and still, from other substantial evidence left in the record, the jury, in judging of her credibility, might well have found that the essential elements of the crime were established.

IN RE JEWELL.

(No. 4,859.)

(Submitted September 12, 1921. Decided October 3, 1921.)

[201 Pac. 266.]

Attorney and Client—Misappropriation of Funds—Disbarment—Suspension from Office.

1. Where an attorney, charged with failure for some ten months to account for and pay over to a client money collected, at no time concealed the fact from the latter that he had collected but acknowledged that he had misappropriated it to his own use and offered to make, and did make, reparation satisfactory to the client, who thereafter continued to employ him, and accused made no evasion or denial of the charge either before the referee or at the hearing in the supreme court, but frankly admitted his delinquency, suspension from his office as attorney and counselor at law for the period of ninety days *held* sufficient punishment to serve the ends of justice.

DISBARMENT PROCEEDING against John Jacob Jewell. Accused suspended for ninety days, with privilege of reinstatement upon showing of satisfactory proof of good moral character.

Cause submitted without argument or brief.

Mr. L. A. Foot, Assistant Attorney General, for the State.

Mr. John Jacob Jewell, pro se.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This is an original proceeding against John Jacob Jewell, an attorney and counselor at law of the courts of Montana, to procure his disbarment.

Upon issues joined upon the complaint by the answer of the accused, John McKenzie, Esq., was appointed referee to take the testimony and report his findings and recommendations. His report and recommendations heretofore submitted [1] are now before the court for adoption or rejection. The

malpractice or misconduct in his profession of which the accused stands charged, consisted in his retention of, and failure to account for and pay over to J. C. Hauck, a client, and the person entitled thereto, the sum of $2,745.19 from April 7, 1918, to February 15, 1919. The referee found that the accused had misappropriated this sum as charged.

At the hearing in this court the accused did not question the correctness of the finding of the referee but submitted himself thereon for judgment. Indeed, by a reading of the testimony we find that at the hearing before the referee, the accused made no evasion or denial of the charge but frankly admitted his delinquency. It further appears that, though he failed to remit to Hauck when the money came into his hands, he at no time concealed the fact that he had collected it. When called upon by Hauck to account for it, he stated to him that he had misappropriated it and offered to make reparation. He thereupon made reparation which Hauck deemed entirely satisfactory. It further appears that after he made reparation, Hauck employed him as theretofore.

It is not necessary to enter into a discussion of the facts. We may remark, however, that we are inclined to believe that, though the conduct of the accused was wholly inexcusable, the circumstances were such as to lead the members of this court to believe that the ends of justice do not require the extreme penalty of permanent disbarment, but that they will be served if the accused be suspended from his office for a definite time. The facts disclosed by the evidence as a whole present a case similar in many of its aspects to that of *In re Burke*, 55 Mont. 303, 176 Pac. 421. The referee recommends this disposition of the matter. In view of all the circumstances we think we may adopt his recommendation.

It is therefore ordered that John Jacob Jewell be suspended from his office as attorney and counselor at law for the period of ninety days from this date. At the expiration of that time, he may be reinstated as attorney and counselor at law

upon paying to the clerk of this court the costs incurred herein and presenting to this court satisfactory proof of his good moral character in the meantime.

ASSOCIATE JUSTICES REYNOLDS, COOPER, HOLLOWAY and GALEN concur.

SMITH, APPELLANT, *v.* CHRISTE ET AL., RESPONDENTS.

(No. 4,442.)

(Submitted September 16, 1921. Decided October 3, 1921.)

[201 Pac. 1011.]

Real Property—Contracts — Rescission — Waiver — Election of Remedies.

Land Contracts—Fraud—Rescission—Election of Remedies.

1. Where a contract for the purchase of land was procured through false representations whereby the vendee has been deceived and defrauded, he has an election of remedies: he may stand upon the contract and sue for damages, or rescind the contract, but cannot pursue both.

Same—Duty of Party Desiring to Rescind.

2. Under section 5065, Revised Codes, one desiring to rescind a contract must act promptly upon discovery of the facts which entitle him to rescind and he is aware of his right to rescind, and restore or offer to restore, to the other party everything of value which he has received from him under the contract.

Same—Rescission—Waiver.

3. Plaintiff brought action to rescind a land contract on the ground of fraud, and recover damages resulting from defendant's breach. He alleged that defendant had fraudulently represented to him, in the late fall when the contract was made, that the land was free from fan weed, and testified that in the spring he discovered that the land was overrun with the weed. Four months thereafter he served notice upon defendant that he desired to rescind and tendered back a deed to the premises, but continued to occupy them until the date of the trial, about a year from the date when he first became aware of the alleged fraud, and harvested and sold a crop of wheat therefrom. *Held*, that plaintiff, by his conduct in retaining possession of the land, exercising acts of ownership of it, and retaining the benefits therefrom, waived his right to rescind.

---

2. How, and within what time, right of rescission must be exercised, see note in 50 **Am. Dec.** 672.

Limitations on right to rescind a fraudulent contract, see note in 1 **Ann. Cas.** 910.

[60 Mont. 604.]

Appeal from District Court, Fergus County; Jack Briscoe, Judge.

ACTION by Anthony J. Smith against Emil J. Christe and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Messrs. Marshall & Dousman and *Mr. C. W. Buntin*, for Appellant, submitted a brief and one in reply to that of Respondents; *Mr. Charles J. Dousman* and *Mr. Buntin* argued the cause orally.

Messrs. Belden & De Kalb, for Respondents, submitted an original and a supplemental brief; *Mr. H. L. De Kalb* argued the cause orally.

MR. JUSTICE REYNOLDS delivered the opinion of the court.

Action was commenced for rescission of a certain land contract and consummated sale in fulfillment of the contract from defendant Christe to plaintiff. At the close of plaintiff's case, motion for judgment was made by defendants, which motion was granted. Judgment was thereupon entered in favor of defendants. Plaintiff has appealed from the judgment.

It appears from the proof that on or about the 19th of October, 1917, plaintiff entered into a certain written contract with defendant Christe to purchase certain land situate in Fergus county, Montana, consisting of approximately 480 acres, payment therefor to be made serially, and upon completion of payments he was to receive a deed. On or about the 22d of March, 1918, a portion of the purchase price having been paid, a deed was given by defendant Christe to plaintiff and his wife covering the premises, and thereupon a note and mortgage were given by plaintiff and wife to defendant Bank of Fergus County to cover the balance of the purchase price. While the mortgage was taken in the name of the bank, it

[1, 2] appears that defendant Christe was and is the owner of the same. Prior to the execution of the contract defendant Christe represented to plaintiff that the land in question was free of fan weed with the exception of a few acres which he described. Plaintiff insists that he relied upon such representations; that they were false, and that he has been misled to his prejudice. Upon execution of the deed to the premises to plaintiff, he moved upon the land and made it his home. On or about the 5th of April he first discovered that the land was overrun with fan weed and thereupon formed the intention of tendering back to defendant Christe a deed to the premises and demanding a return of the payments which he had made, with interest thereon, and the cancellation of the note and mortgage. At that time he was aware of his rights in the matter. On or about the fifth day of July he served upon defendant Christe a written notice in which he made the tender above mentioned, and demanded the return of his money, the interest thereon, the cancellation of the note and mortgage, together with damages resulting from defendant's breach of the contract. Although, as plaintiff testified, he knew on or about the fifth day of April, 1918, that the land was infested with fan weed, yet he continued to occupy the premises from that time until the trial of this action, which was held in March, 1919, and during that time made improvements upon the premises, employed labor upon the land, and harvested and sold off the ranch a crop of over 800 bushels of wheat. The question is whether or not, under these circumstances, plaintiff is entitled to rely upon his attempted rescission of the sale and recover back the moneys paid, with interest thereon, and have decreed a cancellation of the note and mortgage given by himself and wife as part payment on the purchase price.

The rule is settled beyond controversy that in case a contract for the purchase of land is procured through false representations whereby the vendee has been deceived and de-

frauded, the latter has an election of remedies. He may stand upon the contract and bring an action for damages or he may rescind the contract, returning all of value he has received, and receive whatever of value with which he may have parted. He may elect to pursue either course, but he cannot pursue both of them. In case he desires rescission of the contract, he must act promptly upon discovery of the facts which entitle him to rescind and he is aware of his right to rescind, and "he must restore to the other party everything of value which he has received from him under the contract or must offer to restore the same upon condition that such party shall do likewise unless the latter is unable or positively refuses to do so." (Sec. 5065, Rev. Codes.) If, then, in this particular case, plaintiff desired to rescind because of the alleged fraud, it was his duty to tender back to defendant Christe all that he had received by virtue of the sale and keep his tender good. He could not stand upon the contract and at the same time demand its rescission. Such conduct is illogical, inconsistent and unfair to the vendor. Among other things that [3] plaintiff received as a result of the sale was the possession of the property, and if he desired rescission, it was his duty to restore possession to defendant Christe, or, at least, vacate the premises so that Christe could resume possession at any time. Instead of doing this, however, plaintiff continued in possession of the premises, exercised dominion over the same up to and including the trial of this action, covering a period of approximately one year from the time of discovery of the alleged fraud, and enjoyed all the fruits of such possession for that period. It is our opinion that such conduct is inconsistent with any claim of rescission and that even though plaintiff served upon defendant Christe a notice of rescission, the sufficiency of which, however, is doubtful, yet by his conduct in retaining the possession of the ranch, exercising acts of ownership over it and retaining the benefits of such possession, rescission was waived. Such a course is

more in the nature of affirmation of the sale than of repudiation of it. (*Ott* v. *Pace*, 43 Mont. 82, 115 Pac. 37.) Under these circumstances the trial court was justified in granting the motion for judgment.

For the reasons hereinbefore stated, the judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES COOPER and HOLLOWAY concur.

MR. JUSTICE GALEN, being absent, did not hear the argument and takes no part in the foregoing decision.

Rehearing denied November 5, 1921.

MAJORS, APPELLANT, *v.* COUNTY OF LEWIS AND CLARK ET AL., RESPONDENTS.

(No. 4,433.)

(Submitted September 14, 1921. Decided October 3, 1921.)

[201 Pac. 268.]

Counties—Jails — Sheriffs — Federal Prisoners — Subsistence— Compensation—To Whom Payable.

Counties—Subject to Legislative Control.

1. Counties are political subdivisions of the state and as such subject to legislative supervision and control.

Same—Jails—Federal Prisoners—Compensation.

2. Under section 9763, Revised Codes, counties must furnish the use of their jails without compensation for the accommodation of federal prisoners, the United States government being required to pay for their support or subsistence only.

Same — Federal Prisoners — Subsistence — Contract With United States—Parties.

3. *Held*, that the provision of section 5547, United States Revised Statutes, making it the duty of the Attorney General of the United States to contract with "the managers or proper authorities having control" of federal prisoners in county jails for their subsistence, contemplates that the contract shall be made with the sheriffs and not with the boards of county commissioners, the former, under Code

provisions, being the custodians of the jails and answerable for the safekeeping of the persons therein confined.

Same—Federal Prisoners—Subsistence—Compensation—To Whom Due.

4. Where a contract for the subsistence of federal prisoners in a county jail was entered into between the Attorney General of the United States and the board of county commissioners instead of with the sheriff as it should have been (par. 3, above), the funds received by the county for such service inured to the benefit of the sheriff, were not public funds and had no place in the county treasury.

Same — Board of Prisoners — Statutory Provision — Applicable to What State Prisoners Only.

5. Section 3138, Revised Codes, limiting the fees of the sheriff for the board of prisoners to fifty cents per day for each prisoner, has reference to prisoners confined by state authority and not to federal prisoners.

Appeal from District Court, Lewis and Clark County; R. Lee Word, Judge.

ACTION by Edward J. Majors against Lewis and Clark County, and another. Judgment for defendants. Plaintiff appeals. Reversed and remanded.

Messrs. McIntire & Murphy, for Appellant, submitted a brief; *Mr. H. G. McIntire* argued the cause orally.

Under the statutes of Montana, the sheriffs of the various counties, and not the boards of county commissioners, are the "manager or proper authorities" having control of federal prisoners in county jails within the meaning of section 5547, United States Revised Statutes. (*Lloyd* v. *Board of Commrs.*, 15 Mont. 435, 39 Pac. 457; *In re Kays*, 35 Fed. 288; *Avery*, v. *Pima County*, 7 Ariz. 26, 60 Pac. 702.)

That a board of county commissioners has no authority to enter into contracts for other purposes than those authorized by statute is practically axiomatic in Montana, for this court has repeatedly held that a "board of county commissioners is a body of limited jurisdiction, and before a power may be exercised by it, the authority for action must be found written in the law, or it must be clearly implied from some express grant of power." (*State ex rel. Gillett* v. *Cronin*, 41 Mont. 293, 109 Pac. 144; *State ex rel. Lambert* v. *Coad*, 23 Mont. 131,

57 Pac. 1092.) The statutes do not authorize such boards to make contracts with the United States government for the support of federal prisoners, nor is any such authority deducible from any statute. (*Kelly* v. *Multnomah County*, 18 Or. 356, 22 Pac. 1110.) Nothing that we can say in this regard can improve upon the language of this court in *Lebcher* v. *Commissioners of Custer Co.*, 9 Mont. 315, 320, 23 Pac. 713.

Now, what is the contract or agreement with the United States authorities in the present instance? The complaint alleges, and the demurrer admits, that it is for the "*support*" of federal prisoners. This includes, as we have suggested, much more than their *board*. This latter word is defined "to furnish with meals, or with meals and lodging, especially for pay" (New Standard Dictionary), but the word "support" is defined, "to supply means for the maintenance of; to furnish with what is needed; provide for." (*Id.*) The distinction between the two words has been consistently and regularly pointed out by the courts and enforced. (See *Kelly* v. *Multnomah County*, *supra*; *Norton* v. *Sims*, 85 Kan. 822, 118 Pac. 1071; *Wall* v. *Williams*, 93 N. C. 327, 53 Am. Rep. 458.)

The present action is one for the recovery of moneys received by the respondents but to which the appellant is equitably entitled. That such an action lies is well settled, the rule deducible from the cases being, "whenever a man receives money belonging to another without any reason, authority or consideration, an action lies against the receiver as for money received to the other's use; and this as well where it is received through mistake under color, and upon an apprehension of having a good authority to receive it, as where it is received by imposition, fraud or deceit in the receiver." There need be no privity between the receiver and the person entitled to the money, nor promise to pay, and the action lies as well against a municipal corporation as against an individual. The following authorities abundantly sustain the above principle. (*Mer-*

chants' & M. Bank v. *Barnes*, 18 Mont. 337, 56 Am. St. Rep. 586, 47 L. R. A. 737, 45 Pac. 218; *Soderberg* v. *King County*, 15 Wash. 194, 55 Am. St. Rep. 878, 33 L. R. A. 670, 45 Pac. 785; *Mumford* v. *Wright*, 12 Colo. App. 214, 55 Pac. 744, 746; 27 Cyc. 864.)

Mr. S. C. Ford, Attorney General, and *Mr. Otto A. Gerth*, Assistant Attorney General, for Respondent, submitted a brief; *Mr. L. A. Foot*, Assistant Attorney General, argued the cause orally.

The principle for which we are here contending is that when a county, as such, makes contracts, the contracting party is the county itself and not the official through whom it is executed. The official is merely the agent of the county through whom it acts, be it contractually or otherwise. (*Gannon* v. *Hohusen*, 14 Ariz. 523, 132 Pac. 566.) In the case of *Avery* v. *Pima County*, 7 Ariz. 26, 60 Pac. 702, we find an authority for the contention of the respondent in the case at bar, to the effect that regardless of what particular officer of the county makes a contract with the federal government for the support and maintenance of the federal prisoners in the county jail, such contracts are made for the county and not for the individual county officials. The proceeds of such contract go to the county and not to the individual official as his private fund. The statutes of Arizona upon the proposition here involved are similar to those of Montana.

The appellant contends that a distinction is to be made between state prisoners and federal prisoners so far as the sheriff is concerned. So far as our search goes, no distinction is made and the appellant has cited no section of our statute making that distinction so far as the sheriff's remuneration is concerned. In addition to this the appellant's argument analyzed would result in very extravagant claims. He claims the right as sheriff to use the county jail in which to house prisoners committed to his charge by the federal government. He

claims that the contract to be made with the federal government, so far as the county is concerned, is a private contract between the sheriff and the federal government, the proceeds of which go to the sheriff. This would result in the proposition that the sheriff need not account to the county for the use of the jail which it has constructed, for the light and heating which it furnishes, for the time of the jailers, and his own time which the county owns by virtue of a salary which it pays the jailer and the sheriff.

The beneficiary under the contract with the federal government is the county itself and not the sheriff. It is correctly said in the case of *Gannon* v. *Housen, supra,* that the county commissioners are the agency through which the county acts. The same would be true if the sheriff acted instead of the county commissioners. It is also correctly said in the case of *Avery* v. *Pima County, supra,* that even though the sheriff by virtue of his being in charge of the jail and having control of the prisoners, should be the proper party to contract with the federal government, the money would pass through his hands into the county treasury. The sheriff is an employee of the county for which he receives full compensation. He cannot set himself up in the business of a sort of compulsory hostler and make side money at the expense of the county.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought to recover money alleged to have been received by the defendant to the plaintiff's use.

The complaint sets forth that from January, 1917, to January, 1919, plaintiff was sheriff of Lewis and Clark county; that during his term there were confined in the Lewis and Clark county jail a large number of persons committed thereto by judgments or orders of the federal authorities for this district—the total number of days during which such persons were so confined amounted to 7,886; that by agreement the

United States paid for the subsistence of such persons seventy-five cents per day, amounting to $5,914.50; that this amount was received by the defendant county and was the reasonable compensation for the services rendered and the actual amount expended by plaintiff therefor; that the county has paid to plaintiff only $3,942 or at the rate of fifty cents per day per person so confined, and has retained the balance, the equivalent of twenty-five cents per day, and has refused to pay the same or any part thereof to plaintiff. The prayer is for $1,971.50. A general demurrer was sustained to this complaint, judgment entered dismissing the action, and plaintiff appealed.

The trial court proceeded upon the theory—indicated in a memorandum opinion—that since the statutes of this state then in force limited the compensation of the sheriff for board of prisoners to fifty cents per day per prisoner, plaintiff could not recover more than that amount.

The one question presented for determination is: To whom does the money paid by the United States for the subsistence of federal prisoners belong? It is beyond controversy that the United States cannot compel any state or territory to care for federal prisoners and that the consent of the state or territory, as the case may be, to do so for the accommodation of the federal government is necessary. By joint resolution of the first Congress (September 23, 1789) the several states were requested to consent to the use of their common jails for the detention of federal prisoners and to require their proper officers to receive, support and safely keep such prisoners until discharged in due course of law, the United States to pay for the support of such prisoners and also pay fifty cents per month for each prisoner so confined therein for the use and upkeep of every such jail so used.

So far as our information goes, every state has acceded to the request expressed in the joint resolution above, to the extent that federal prisoners may be confined and cared for in local jails. By an Act approved January 12, 1872 (5th Div.,

Comp. Stats., sec. 1275), the territory of Montana expressed its consent, but undertook to define the terms upon which the privilege might be exercised, *viz.*, that the United States should pay for the support of such prisoners and the legal fees of the jailers and also ten dollars per month to the county whose jail was so used for the use and upkeep of the jail.

Whatever may be said of the legislative policy expressed in these early statutes, the attempt by either the federal government or the territorial legislature to prescribe specific compensation for the use of local jails was abandoned. Section 5547, United States Revised Statutes, provides: "The Attorney General shall contract with the managers or proper authorities having control of such prisoners, for the imprisonment, subsistence and proper employment of them." Section 3026, Political Code, 1895, provided: "The sheriff must receive and keep in the county jail any prisoner committed thereto by process or order issued under the authority of the United States, until he is discharged according to law, as if he had been committed under process issued under the authority of this state; provision being made by the United States for the support of such prisoner." The provisions of section 3026 have been in effect continuously since their enactment and are now found in section 9763, Revised Codes.

This state might have refused to permit its jails to be used for the incarceration of federal prisoners unless compensation was made therefor, but it saw fit, as it had the right to do, to relinquish the claim asserted in the territorial statute above **[1, 2]** and to limit its demand to the single item included in section 9763, *viz.*, provision for the support of such prisoners, and since Lewis and Clark county is but a political subdivision of the state and subject to legislative supervision and control (*Hersey* v. *Neilson*, 47 Mont. 132, Ann. Cas. 1914C, 963, 131 Pac. 30), it is bound by the statute and cannot complain that it is required to furnish the use of its jail, without

compensation, for the accommodation of the general government.

It is perfectly apparent from this brief history that the term "support" is employed in section 9763 as synonymous with the term "subsistence" employed in section 5547, United States Revised Statutes. Indeed, the two terms are synonymous according to all standard reference works. Neither argument nor authorities can fortify the conclusion which is compelled that it was the intention of the United States and this state that by contract the former should pay for the support or subsistence only, of federal prisoners confined in a county jail. [3] The statute (section 5547) above requires that such contract shall be made by the Attorney General for the United States, on the one part, with the person or body having the management and control of such prisoners, on the other. By this process of elimination the controversy before us is reduced to an answer to the inquiry:

To whom is reference made in the phrase "the managers or proper authorities having control of such prisoners?" It cannot be contended that there is any subtle meaning concealed in the language employed. The terms are in common use and generally understood, but any possible controversy over the construction of the phrase is obviated by express legislative declaration. Section 5539, United States Revised Statutes, provides that whenever any federal prisoner is confined in a county jail, he shall be under the exclusive control of the officer having charge of such jail pursuant to the law of the state in which the jail is situated. Section 3010, Revised Codes, imposes upon the sheriff the duty to "take charge of and keep the county jail and the prisoners therein." Section 9759, Revised Codes, provides that "the common jails in the several counties of this state are kept by the sheriffs of the counties in which they are respectively situated," *etc.* Section 9764 provides that a sheriff to whose custody a federal prisoner is committed is answerable for his safekeeping in the courts of the United States according to the laws thereof. Under like

statutory provisions this court declared that the sheriff has the custody of the jail of his county and the prisoners therein. He is to keep the prisoners and he is personally liable for their escape if it occurs. (*Lloyd* v. *Board of Commrs.*, 15 Mont. 433, 39 Pac. 457).

From these considerations it follows as of course that the sheriff is the proper party with whom the contract is to be made for the subsistence of persons committed to the jail by federal authority, and this is the conclusion reached by the courts which have been called upon to construe statutes similar to our own. (*In re Kays*, 35 Fed. 288; *Avery* v. *Pima County*, 7 Ariz. 26, 60 Pac. 702.) It is altogether immaterial that in [4] this instance the contract was made in the name of Lewis and Clark county. It inured to the benefit of the plaintiff. The funds received from the United States were not in any sense public funds and had no place in the county treasury. They were received to the use of the plaintiff to whom they belonged under the contract and upon whom the burden was imposed to provide the subsistence for the person so incarcerated.

The trial court fell into error in assuming that section [5] 3138, Revised Codes, relates to the support of persons confined in a county jail by federal authority. That section has to do only with the *board* of such prisoners as are confined by state authority. No one could contend seriously that the term "board" used therein means the same as the term "support" employed in section 9763, Revised Codes, or the term "subsistence" used in section 5547, United States Revised Statutes.

The complaint states a cause of action and the court erred in sustaining this demurrer. The judgment is reversed and the cause is remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, COOPER, and GALEN concur.

MEMORANDA

OF

DECISIONS RENDERED WITHOUT EXTENDED OPINIONS DURING THE PERIOD EMBRACED IN THIS VOLUME.

No. 4,556.—DAN J. DONOHUE, RESPONDENT, *v.* PRAIRIE COUNTY, APPELLANT.

Appeal from District Court, Prairie County; Geo. P. Jones, Judge.

Decided May 10, 1921.

PER CURIAM.—Upon motion of respondent, the appeal in the above-entitled cause is dismissed.

Mr. Jos. C. Tope and *Mr. George W. Farr*, for Appellant.

Mr. N. A. Rotering, for Respondent.

No. 4,365.—THAD. S. SMITH, RESPONDENT, *v.* JACOB MILLER, APPELLANT.

Appeal from District Court, Yellowstone County; A. C. Spencer, Judge.

Decided May 11, 1921.

PER CURIAM.—Pursuant to praecipe for dismissal filed herein, the appeal in the above-entitled cause is dismissed as settled.

Mr. B. L. Price and *Messrs. Dillavou & Moore*, for Appellant.

Mr. Thad. S. Smith and *Mr. Scott S. Smith*, for Respondent.

No. 4,415.—STATE, RESPONDENT, *v.* WILL PERCY, APPELLANT.

Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

Decided May 16, 1921.

PER CURIAM.—At the personal request of appellant that the appeal in the above-entitled cause be not prosecuted, it is dismissed.

Mr. John A. Coleman, for Appellant.

No. 4,862.—MONTANA GRAIN GROWERS, RESPONDENT, *v.* M. J. WEERSING, APPELLANT.

Appeal from District Court, Cascade County.

Decided May 16, 1921.

PER CURIAM.—On motion of respondent asking for the dismissal of the appeal herein on the ground of failure to file transcript, the appeal is dismissed.

Mr. John W. Stanton, for Respondent.

No. 4,836.—MONTANA GRAIN GROWERS, RESPONDENT, *v.* B. A. SCOLLARD, APPELLANT.

Appeal from District Court, Cascade County.

Decided May 20, 1921.

PER CURIAM.—On motion of respondent to dismiss the appeal herein because an undertaking on appeal has not been filed, the appeal is dismissed.

Mr. John W. Stanton, for Respondent.

No. 4,462.—STATE, RESPONDENT, *v.* CAROLINE HENKEL, APPELLANT.

Appeal from District Court, Flathead County; T. A. Thompson, Judge.

Decided May 23, 1921.

PER CURIAM.—On motion of appellant, the appeal herein is dismissed.

Messrs. Logan & Child, for Appellant.

No. 4,883.—N. C. FOLGER, APPELLANT, *v.* UPPER GLENDIVE-FALLON IRRIGATION DISTRICT, RESPONDENT.

Appeal from District Court, Dawson County; Daniel L. O'Hern, Judge.

Decided June 4, 1921.

PER CURIAM.—On motion of appellant the appeal in the above-entitled cause is dismissed as settled.

Messrs. Loud & Leavitt, for Appellant.

No. 4,413.—LAURA STEWART, RESPONDENT, *v.* GEORGE ABEL, APPELLANT.

Appeal from District Court, Yellowstone County; A. C. Spencer, Judge.

Decided June 7, 1921.

PER CURIAM.—It having been made to appear to the court that the above-entitled cause has been settled, the appeal is dismissed.

Messrs. Reynolds & Shea, for Appellant.

No. 4,418.—MABEL B. POINTER, APPELLANT, *v.* THOMAS MULLIN, RESPONDENT.

Appeal from District Court, Powell County; Geo. B. Winston, Judge.

Decided June 8, 1921.

PER CURIAM.—This cause coming on for hearing this day, and counsel for the respective parties not appearing and briefs not having been filed, the appeal is dismissed.

Mr. W. E. Keeley and *Mr. W. E. Castleton*, for Appellant.

No. 4,891.—STATE EX REL. THE SEVEN PRODUCTS CO., RELATOR, *v.* DISTRICT COURT ET AL., RESPONDENTS.

Original application for Writ of Prohibition directed to the District Court of the Second Judicial District, and W. E. Carroll, a Judge thereof.

Decided June 20, 1921.

PER CURIAM.—The application of the relator herein for writ of prohibition is, after due consideration, denied.

Messrs. Frank & Gaines, for Relator.

No. 4,885.—HARRIET W. BOULET, RESPONDENT, *v.* BUTTE MOTORS CAR CO., APPELLANT.

Appeal from District Court, Silver Bow County.

Decided June 20, 1921.

PER CURIAM.—On motion of respondent in the above-entitled cause, the appeal is dismissed.

Mr. Harry Meyer, for Appellant.

Mr. John G. Brown, for Respondent.

No. 4,896.—VICTORIA HAYDEN, APPELLANT, *v.* MARY E. LALOR, RESPONDENT.

Appeal from District Court, Granite County; Geo. B. Winston, Judge.

Decided June 29, 1921.

PER CURIAM.—Upon stipulation of the parties, the appeal in the above-entitled cause is dismissed.

Mr. J. J. McDonald, Mr. E. F. Flynn and *Mr. S. P. Wilson*, for Appellant.

Messrs. Cooper, Stephenson & Hoover and *Messrs. Rodgers & Rodgers*, for Respondent.

No. 4,897.—STATE EX REL. HAROLD WORDAL, RELATOR, *v.* DISTRICT COURT ET AL., RESPONDENTS.

Original application for Writ of Supervisory Control directed to the District Court of the Fourth Judicial District, and Asa L. Duncan, a Judge thereof.

Decided June 30, 1921.

PER CURIAM.—The application of the relator for writ of supervisory control is, after due consideration, denied.

Mr. Jos. R. Wine, for Relator.

No. 4,899.—MID NORTHERN OIL CO., PLAINTIFF, *v.* J. W. WALKER, STATE TREASURER, ET AL., DEFENDANTS.

Original action for injunction to restrain defendant from carrying out the provisions of House Bill No. 115 of the Seventeenth Legislative Assembly (Chap. 266, Laws 1921).

Decided July 1, 1921.

PER CURIAM.—The application of plaintiff for an order requiring defendants to show cause why they should not be restrained from carrying out the provisions of Chapter 266, Laws of 1921, and asking that the court take original jurisdiction, is, after due consideration denied.

Mr. Donald Campbell, for Plaintiff.

No. 4,909.—STATE EX REL. JAMES TROGLIA, RELATOR, *v.* DISTRICT COURT ET AL., RESPONDENTS.

Original application for Writ of Supervisory Control directed to the District Court of the Fifth Judicial District, and Jos. C. Smith, a Judge thereof.

Decided September 13, 1921.

PER CURIAM.—The application of the relator herein for writ of supervisory control is, after due consideration, denied.

Mr. J. R. Jones, for Relator.

No. 4,919.—STATE EX REL. ARTHUR TAYLOR ET AL., RELATORS, *v.* DISTRICT COURT ET AL., RESPONDENTS.

Original application for Writ of Prohibition directed against the District Court of the Third Judicial District, and Geo. B. Winston, Judge thereof.

Decided September 13, 1921.

PER CURIAM.—The application of the relators herein for writ of prohibition is, after due consideration, denied.

Mr. J. H. Duffy and *Mr. R. E. McHugh,* for Relators.

No. 4,884.—LEONORA CONRAD ET AL., RESPONDENTS, *v.* THE DAY HANSEN SECURITY CO., APPELLANT.

Appeal from District Court, Powell County; Geo. B. Winston, Judge.

Decided September 13, 1921.

PER CURIAM.—On motion of respondents to dismiss the appeal herein for failure of appellant to file transcript or brief within the time allowed by law, the appeal is dismissed.

Mr. S. P. Wilson, for Respondents.

No. 4,523.—GEO. NELSON ET AL., RESPONDENTS, *v.* MONIDAH TRUST, APPELLANT.

Appeal from District Court, Silver Bow County; Edwin M. Lamb, Judge.

Decided September 13, 1921.

PER CURIAM.—Pursuant to stipulation of the parties herein, the appeal is dismissed, each party to pay his own costs.

Mr. James E. Murray and *Mr. J. F. Emigh*, for Appellant.

Mr. J. A. Poore, for Respondents.

No. 4,910.—MARIE MEST, RESPONDENT, *v.* ALEXANDER McKAY, APPELLANT.

Appeal from District Court, Madison County.

Decided September 17, 1921.

PER CURIAM.—Pursuant to motion of appellant, the appeal herein is dismissed.

Mr. Geo. R. Allen, Mr. Lyman H. Bennett and *Mr. E. B. Howell*, for Appellant.

Mr. M. M. Duncan, for Respondent.

No. 4,455.—REPUBLIC COAL CO., APPELLANT, *v.* LAURA M. CARTER, TREASURER, RESPONDENT.

Appeal from Musselshell County; Geo. P. Jones, Judge.

Decided September 20, 1921.

PER CURIAM.—This cause coming on for hearing this day, and it appearing that no briefs have been filed, it is ordered that that certain judgment of nonsuit made by the court below on the ninth day of July, 1918, be and it is hereby affirmed at the cost of the appellant.

Mr. Thos. J. Matthews, for Appellant.

No. 4,598.—JAMES R. COSTELLO, RESPONDENT, *v.* MARY A. COSTELLO, APPELLANT.

Appeal from District Court, Silver Bow County; Edwin M. Lamb, Judge.

Decided September 23, 1921.

PER CURIAM.—This cause this day came on for judgment and decision by stipulation of the parties. Whereupon, in pursuance of said stipulation of the respective parties filed herein, it is now here ordered and adjudged that the judgment of the court below, made on the thirtieth day of August, 1919, and the order made on the twentieth day of December, 1919, be, and the same are hereby, affirmed; each party to pay his own costs of appeal.

Messrs. Nolan & Donovan, for Appellant.

Messrs. Binnard & Rodger, for Respondent.

No. 4,908.—STATE EX REL. S. L. DYER, RELATOR, *v.* DISTRICT COURT ET AL., RESPONDENTS.

Original application for Writ of Supervisory Control directed against the District Court of Powell County, and Geo. B. Winston, its Judge.

Decided September 26, 1921.

PER CURIAM.—The application of the relator herein for writ of supervisory control is, after due consideration, denied.

Mr. S. P. Wilson, for Relator.

No. 4,911.—STATE EX REL. BOURQUIN ET AL., RELATORS, *v.* DISTRICT COURT ET AL., RESPONDENTS.

Original application for writ of supervisory control directed to the District Court of Silver Bow County, and Jeremiah J. Lynch, a Judge thereof.

Decided September 26, 1921.

PER CURIAM.—The applications of the relators for writ of supervisory control is, after due consideration, denied.

Mr. Wellington D. Rankin, Attorney General, and *Mr. Ed. Fitspatrick,* for Relators.

No. 4,936.—HANNAH LEARY, RESPONDENT, *v.* CITY OF BUTTE, APPELLANT.

Appeal from District Court, Silver Bow County.

Decided October 3, 1921.

PER CURIAM.—The motion of respondent to dismiss the appeal herein for the reason that the transcript has not been filed within the time allowed by law, is granted and the appeal dismissed.

Mr. M. Donlan, for Respondent.

INDEX—VOL. 60.

ACCOUNTING.

See Findings, 1, 2; Partnership, 1–3.

ACTIONS.

By third party to enforce contract—Complaint,—see Contracts, 14, 15.
Nature, how determined,—see Motions, 1.

ADMISSIONS.

Against interest,—see Criminal Law, 43, 44, 49.
As distinuished from confessions,—see Criminal Law, 41–45.

Need not be Proved.

1. Facts admitted by the answer need not be proved.—Hawley v. Richardson, 118.

ADVERSE CLAIMS.

See Mines and Mining, 1–9.

ADVERSE POSSESSION.

See, also, Real Property, 15–20.

Of mining ground for street purposes,—see Cities and Towns, 4, 5.
Public lands—Gives no title against government,—see Real Property, 9.

AGREED STATEMENT OF FACTS.

Trial—Waiver of defects—Variance,—see Pleading and Practice, 24.

ALIBI.

Refusal of instruction—When not reversible error,—see Criminal Law, 84, 85.

ALIMONY.

Discretion,—see Husband and Wife, 8.

AMENDMENTS.

Of complaint to conform to proof—When rule may not be invoked,—see Pleading and Practice, 23.
Of complaint, when properly denied,—see Pleading and Practice, 28.

APPEAL AND ERROR.

See, also, Criminal Law.

Curing error in admission of evidence,—see Instructions, 3.
Right to nominal damages insufficient to warrant reversal of judgment,—see Damages, 6.

Equity—Conflicting Evidence—Findings—When Conclusive.

1. Where the evidence in an equity case, tried by a jury, is in substantial conflict, the burden rests upon appellant to show that its preponderance was decisively in his favor before a reversal of the judgment on the ground that the findings are not supported by the evidence may be had.—Mason v. Swee, 32.

Same—Findings—Evidence—Showing Necessary for Reversal.

2. While the findings of a jury in an equity case are only advisory and may be adopted or rejected, yet where the trial court by their adoption approved them, a showing that there is a clear preponderance of the evidence against them is necessary before they will be disturbed on appeal.—Mason v. Swee, 32.

Appeal—Rehearing—Limited to Original Grounds Urged.

3. On application for rehearing, the supreme court will not consider grounds for reversal not presented upon the original hearing.—Mares v. Mares, 36.

Same—Verdict—Sufficiency of Evidence—Self-contradictory Statements of Plaintiff—How Viewed on Appeal.

4. In determining whether plaintiff's testimony is sufficient to support a verdict in his favor, his case may be judged by that portion of his self-contradictory testimony which is least favorable to him.—Casey v. Northern Pacific Ry. Co., 56.

Record on Appeal—Defects—Duty of Counsel.

5. It is incumbent upon counsel to so prepare the record on appeal as to present the full merits of their contentions and thus enable the court to review them with intelligence without having to indulge in speculations, and to this end avoid endless repetition in pleadings, clerical inaccuracies and errors in the evidence, or the incorporation of testimony referring to exhibits not in the record, and of exhibits referred to in neither pleadings nor proof.—Hoeller v. Moog, 74.

New Trial Order—Abuse of Discretion.

6. It is only for manifest abuse of discretion on the part of the trial court in granting or refusing a new trial that its action will be reversed on appeal.—Stettheimer v. City of Butte, 111.

Parol Evidence—Curing Error.

7. Error in permitting secondary evidence to be introduced *held* cured by subsequent admission of best evidence.—Hawley v. Richardson, 118.

Receivers—Taxation of Costs—Review.

8. Error in the taxation of costs incident to a receivership is reviewable on appeal from the judgment.—United States Gypsum Co. v. Mackey Wall Plaster Co., 132.

Appeal from Judgment—Record on Appeal—Bills of Exception.

9. *Held*, that the provision of section 7112, Revised Codes, requiring that the record on appeal from a final judgment shall contain the judgment and any bills of exception upon which appellant relies, refers to only such bills of exceptions as are settled under sections 6787 and 6788 or are used on motion for new trial, and that therefore any bill not so settled or used cannot be considered on such appeal. (On rehearing.)—Batchoff v. Butte Pacific Copper Co., 179.

Default Judgment—Refusal to Vacate—Appealable Order.

10. An order, made after judgment, denying a motion to set aside a default and judgment, is appealable under section 7098, Revised

Codes; hence where no appeal was taken, the alleged error in refusing the motion was not reviewable on appeal from the judgment. (On rehearing.)—Batchoff v. Butte Pacific Copper Co., 179.

Same—Premature Entry—Error Within Jurisdiction.

11. Premature entry of default constitutes error within jurisdiction, the judgment following being voidable, not void.—Batchoff v. Butte Pacific Copper Co., 179.

Personal Injuries — Insufficiency — Inadequacy of Damages — When New Trial Improper.

12. Where the evidence of plaintiff in an action for damages for death by negligence was wholly insufficient to warrant a judgment in his favor and the court committed error in not granting defendant's motion for a directed verdict, a judgment in plaintiff's favor for $51 and costs will not be reversed on the ground of inadequacy of damages or a new trial ordered.—Osterholm, Admr., v. Butte Electric Ry. Co., 193.

Assignments of Error—Rules of Supreme Court—Briefs.

13. Where errors are assigned involving the rulings of the trial court upon objections to evidence, appellant must, under subdivision 3b of Rule X of the supreme court, point out in his brief the specific evidence objected to, and give the page or pages of the transcript upon which such rulings may be found.—Clary v. Fleming, 246.

Settlement of Instructions—Objections Reviewable.

14. In its review of an alleged erroneous instruction, the supreme court is limited under section 6746, Revised Codes, to the particular objection to it urged upon the trial court at the time the instructions were settled.—Humber v. Marshall, 267.

Decisions of Appellate Courts—Law of Case.

15. The judgments of appellate courts are as conclusive as those of any other courts, and they not only establish facts, but also settle the law, so that the law as decided upon any appeal must be applied in all the subsequent stages of the cause.—In re Smith's Estate, 276.

Rulings on Evidence—Exceptions must be Reserved.

16. The rule declared by Chapter 135, Laws of 1915, *inter alia* providing that every ruling or decision of the district court on the admissibility of evidence shall be deemed excepted to, has reference to civil, not criminal cases.—State v. Prouty, 310.

Trial—Technicalities.

17. A mere *apex juris* is not sufficient cause for the reversal or modification of a judgment.—State v. Prouty, 310.

Instructions—When Review Unauthorized.

18. Where defendant, through his attorney, at the settlement of the instructions, stated that he had no objections to them, assignments based on alleged error in them cannot be considered on appeal.—State v. Chronopoulos, 329.

Appeal—Rehearing—Power of Supreme Court.

19. On rehearing the supreme court may review the entire case and correct any error that may be apparent, even though such action may not be favorable to movant.—United States Nat. Bank v. Great Western Sugar Co., 342.

Same—Briefs—Specifications of Error—Admission or Rejection of Evidence—Rules.

20. Where error is assigned to the admission or rejection of evidence, the specification must quote the full substance of the evidence ad-

mitted or rejected. (Supreme Court Rules, Rule X, subd. C.)—State v. Bonning, 362.

Federal Questions—Decision of United States Supreme Court Conclusive.

21. In a case involving a federal question, the decisions of the supreme court of the United States are conclusive and binding upon state courts.—J. I. Case Threshing Machine Co. v. Stewart, 380.

Criminal Law—Guilt of Defendant Established—When New Trial not to be Granted.

22. Where the record conclusively establishes the guilt of the defendant charged with crime, a new trial will not be granted even though there was error on the trial, unless it clearly appears that such error actually prejudiced him in his right to a fair trial.—State v. Stevens, 390.

Same—Technical Errors—Insufficient to Reverse Judgment.

23. A conviction will not be set aside for technical errors or defects appearing in the record which do not affect the substantial rights of the accused.—State v. Davis, 426.

New Trial—Motion Based on Documentary Evidence—Review on Appeal.

24. Where a motion for new trial is based entirely upon documentary evidence, the supreme court is in as advantageous a position to pass upon its merits as was the trial court, and will set aside the order if from the record it is unable to ascertain upon what theory the motion could have been granted.—State v. Stein, 441.

Appeal Lies Only When Granted by Statute.

25. An appeal lies only when authorized by statute.—City of Miles City v. Drum, 451.

Police Courts—Criminal Prosecutions Under Ordinances—Appeal.

26. Defendant, charged with wrongfully obstructing an alley, was proceeded against under the statute governing criminal procedure in police courts (Rev. Codes, secs. 9584–9629), convicted and appealed to the district court, where the complaint was dismissed. *Held*, on appeal by the city that, the statute not granting the right of appeal to cities in criminal causes tried in justice or police courts, the appeal did not lie.—City of Miles City v. Drum, 451.

Complaint—Sufficiency—Exception Saved for All Purposes.

27. The sufficiency of the complaint may be tested by demurrer and objection to the introduction of any evidence under it, and exceptions once saved to adverse rulings thereon are saved for all purposes.—Boyle v. Chicago, Mil. & St. Paul Ry. Co., 453.

Appeal—Theory of Case.

28. Where an action, commenced as one in ejectment, was tried as one in equity with the assent of both parties, it will be treated as such on appeal, the parties being bound by the theory adopted by them at the trial.—Bode v. Rollwitz, 481.

Nonappealable Orders—Rejecting and Adopting Findings.

29. Appeals do not lie under section 7098, Revised Codes, from orders rejecting findings of the jury, from conclusions of law, or from the action of the court in adopting certain findings of the jury and making findings of its own, the questions thus sought to be raised being reviewable on appeal from the judgment.—Bode v. Rollwitz, 481.

APPEALABLE ORDERS.

From order refusing to set aside default judgment,—see Appeal and Error, 10.

What are not,—see Appeal and Error, 29.

ARSON.

See Criminal Law, 26–29.

ATTEMPTED RAPE.

See Criminal Law, 3–10.

ATTEMPTS.

See Criminal Law, 58.

ATTORNEY AND CLIENT.

Husband and Wife—Authority of Wife to Employ Counsel for Husband.

1. Under section 6480, Revised Codes, providing that if a husband and wife be sued together the wife may defend for her own right, and if the husband neglects to defend, she may defend for his right also, a wife, pending suit for divorce brought by her, had authority to employ counsel on behalf of her husband, in a suit for partition against both of them in which he had failed to appear.—Buckhouse v. Parsons, 156.

Same—Attorney and Client.

2. An attorney who had been employed by the wife of a husband who had deserted her, to represent him in a partition suit against both, could lawfully pay to the wife the amount awarded to the husband, and was not liable to the latter therefor.—Buckhouse v. Parsons, 156.

Misappropriation of Funds—Disbarment—Suspension from Office.

3. Where an attorney, charged with failure for some ten months to account for and pay over to a client money collected, at no time concealed the fact from the latter that he had collected but acknowledged that he had misappropriated it to his own use and offered to make, and did make, reparation satisfactory to the client, who thereafter continued to employ him, and accused made no evasion or denial of the charge either before the referee or at the hearing in the supreme court, but frankly admitted his delinquency, suspension from his office as attorney and counselor at law for the period of ninety days *held* sufficient punishment to serve the ends of justice.—In re Jewell, 602.

AUTOMOBILES.

Railroad crossing accident—Duty to look and listen—Contributory negligence,—see Railroads, 9, 10.

BAILMENT.

Ownership of Property in Whom.

1. In bailment, the ownership of the chattel is in the bailor, and the possession only in the bailee.—State v. Wallin, 332.

BILLS OF EXCEPTIONS.

Appeal from final judgment,—see Appeal and Error, 9.

BONDS.

Municipal—Issuance at discount prohibited,—see Cities and Towns, 9.

BRIEFS.

Compliance with rules of supreme court,—see Appeal and Error, 13, 20.

BROKERS.

Real Property—Secret Profits—Fraud—Evidence—Insufficiency.

1. In an action against a real estate broker to recover secret profits claimed to have been made by him in a transaction resulting in an exchange of plaintiff's land for that of the purchaser, plaintiff paying to the purchaser the difference between the price set upon his (plaintiff's) land and that taken over by him in exchange, evidence *held* not to sustain a charge of fraud or misrepresentation on the part of the broker as to the value of the land received by plaintiff in exchange, it appearing that plaintiff was an experienced farmer thoroughly conversant with ranch property, had inspected the land before consummating the deal and taken possession, apparently satisfied with his bargain until he learned that the land taken over by him in exchange had been procured by defendant at a less price than he (plaintiff) was required to pay to its owner, no proof of the value of either property having been introduced.—Terry v. Stephens, 82.

BURDEN OF PROOF.

See, also, Criminal Law.

Negligence,—see Personal Injuries, 16.

Homicide—Justification or mitigation,—see Criminal Law, 65.

CANCELLATION OF INSTRUMENTS.

See Contracts, 16–19.

CARRIERS.

See Railroads—Street Railways.

CERTIORARI.

Justices' Courts—Satisfaction of Judgment—Subsequent Annulment Error.

1. Where a judgment rendered by a justice of the peace in an action on a promissory note and an open account had been satisfied by sale of personal property under execution, and thus ceased to exist, the district court, on *certiorari*, was without power to annul and set it aside as having been entered without jurisdiction.—State ex rel. Baird v. Anderson, 515.

CHANGE OF VENUE.

Criminal Law—Discretion.

1. An application for change of place of trial of a criminal cause is addressed to the sound discretion of the court, the ruling of which will not be disturbed on appeal unless abuse thereof is shown.—State v. Davis, 426.

Same—Local Prejudice—Newspaper Articles—Affidavits—Conclusions—Insufficiency.

2. Where affidavits of counsel for defendant filed in support of a motion for change of place of trial of a charge of murder did not contain extracts from alleged inflammatory newspaper articles circulated in the county, and the record on appeal did not present the *voir dire* examination of the jurors as tending to show any unusual circumstances in obtaining a jury, the mere statements therein that there had been talk of lynching and that the tale of the crime had been printed in newspapers and generally read by

the inhabitants of the county, were bald conclusions and properly disregarded by the trial court.—State v. Davis, 426.

Same—Local Prejudice—Proper Denial.

3. Evidence produced by defendant in support of his motion for change of venue on account of local prejudice, consisting of six affidavits and the oral statements of three witnesses, to the effect that because of prejudice against defendant, under charge of murder, he could not secure a jury in the county which would give him a fair and impartial trial, *held* insufficient to show that the trial court abused its discretion, where the state produced affidavits of more than a hundred persons from all parts of the county, deposing that in their respective neighborhoods there existed no prejudice against him, and where the *voir dire* examination of the jury disclosed that of the forty talesmen called, only fourteen were excused because they had formed an opinion upon the merits of the case.—State v. Bess, 558.

Same—Newspaper Accounts—When Insufficient to Show Prejudice.

4. Before the effect of newspaper articles giving an account of a murder can be pronounced so highly prejudicial as to warrant a change of venue, it must be shown that they were passionate enough to excite undue prejudice, to the extent of rendering it impossible for accused to secure a jury free from exception.—State v. Bess, 558.

CHATTEL MORTGAGES.

See Conversion, 1–4; Mortgages, 1, 2.

CIRCUMSTANTIAL EVIDENCE.

See Criminal Law, 27, 28, 90, 91.

CITIES AND TOWNS.

See, also, Nuisances.

Sale and discharging fireworks in violation of ordinance,—see Personal Injuries, 2.

Special Improvements—Resolution of Intention—Sufficiency.

1. A resolution of intention to create a special improvement district, the title of which stated that it was a "resolution of intention," *etc.*, the body of which substantially contained the recitals required by statute and advised the taxpayers of the time and place where their objections to its creation would be heard, was sufficient as against the objection that in it the city council had not declared its intention to create it.—Aiken v. City of Glendive, 1.

Same—Irregularities in Procedure.

2. Omission of the city council, after it had acquired jurisdiction to proceed with the creation of a special improvement, to officially designate a newspaper in the city in which notices inviting proposals for constructing the special improvement contemplated should be published, was an irregularity which, in the absence of averment of injury because thereof, was insufficient to warrant a decree enjoining defendant city from creating the district.—Aiken v. City of Glendive, 1.

Same—Mistake in Publishing Notice—When Insufficient to Invalidate Proceedings.

3. Under section 34, Chapter 89, Laws of 1913, any error in or departure from the mode of publication of any notice incident

to the creation of a special improvement district is insufficient to invalidate the proceedings, when it appears that the notice was actually published for the time required by the Act.—Aiken v. City of Glendive, 1.

Quieting Title—Prescription—Adverse Possession—Findings—Evidence—Sufficiency.

4. In an action to quiet title to portions of a lode mining claim alleged by defendant city to have been in its possession and used by it adversely for street purposes for more than the statutory period, evidence *held* not to preponderate against the finding of the jury in favor of defendant.—Stettheimer v. City of Butte, 111.

Streets and Alleys—Prescription.

5. Under sections 6432 and 6435, Revised Codes, a prescriptive right can be built upon public use of land for street purposes, jurisdiction having been acquired by the city authorities and maintained for a period of ten years.—Stettheimer v. City of Butte, 111.

Police Courts—Criminal Prosecutions Under Ordinances—Appeal.

6. Defendant, charged with wrongfully obstructing an alley, was proceeded against under the statute governing criminal procedure in police courts (Rev. Codes, secs. 9584–9629), convicted and appealed to the district court, where the complaint was dismissed. *Held*, on appeal by the city that, the statute not granting the right of appeal to cities in criminal causes tried in justice or police courts, the appeal did not lie.—City of Miles City v. Drum, 451.

Special Improvements—Departure from Resolution of Intention not Permitted.

7. In its resolution of intention to create a special improvement district, the city council must describe the character and nature of the contemplated improvements with sufficient particularity to advise the taxpayer affected, and the improvements to be made must correspond substantially with those set forth in the resolution, and no material change or departure therefrom can be made.—Evans v. City of Helena, 577.

Same—Material Departure from Resolution of Intention—Injunction.

8. Under a resolution of intention to create a special improvement district for the purpose of paving streets, with the necessary excavations, cutting, filling, *etc.*, and "incidental work," *held* that defendant city was properly enjoined from entering into a contract the provisions of which departed substantially from the purposes set forth in the resolution, in that they included reduction in the street widths and the construction of new parking, curbing and storm sewers, each of which constitutes a distinct city improvement under Chapter 89, Laws of 1913, as amended by Chapter 142, Laws of 1915, and none of which was therefore subject to inclusion under the term "incidental work."—Evans v. City of Helena, 577.

Same—Bonds or Warrants—Issuance at Discount Prohibited.

9. *Held*, under section 26 of Chapter 89, Laws of 1913, that the city council has no power to issue bonds or warrants at a discount, in payment of special improvement work, and that therefore a contract let to one who in making out his bid took into consideration the fact that the warrants he would receive were worth only ninety cents on the dollar, and therefore added ten per cent to the actual cost, was invalid as an attempt to do indirectly what the council was prohibited from doing directly.—Evans v. City of Helena, 577.

COMMON LAW.

Remedies for unreasonable freight charges superseded by Chapter 37, Laws 1907,—see Railroads, 1.

COMPROMISE AND SETTLEMENT.

Pleading—Answer must plead readiness and ability to perform,—see Promissory Notes, 3.

CONCLUSIONS.

In affidavits for change of venue,—see Criminal Law, 60.

In information,—see Criminal Law, 55, 56.

Of law—Appeal does not lie from,—see Appeal and Error, 29.

CONDITIONAL SALES CONTRACTS.

See Mortgages, 1, 2.

CONFESSIONS.

As distinguished from admissions,—see Criminal Law, 42–45, 49.

"Third degree,"—see Criminal Law, 53.

CONSTITUTION.

Foreign Corporations—Capital Stock—Certificate of Increase—Filing Fee—Statute—Unconstitutionality.

1. *Held*, that section 165, Revised Codes, requiring the secretary of state to collect a graduated fee for the filing of certificates of incorporation and increase of capital stock, based upon the entire capital stock, is invalid as to a foreign corporation engaged both in interstate and intrastate business and only a portion of whose capital stock is represented by property owned and business done by it in this state, as in contravention of the commerce and due process of law clauses of the federal Constitution.—J. I. Case Threshing Machine Co. v. Stewart, 380.

CONSTITUTION OF MONTANA.

(List of Sections Cited or Commented upon.)

Article XV, section 7.....226

CONTINUANCE.

Affidavit—Contents—Insufficiency—Discretion,—see Criminal Law, 70–73.

CONTRACTS.

See, also, Mortgages; Promissory Notes.

Oral Contract—Work and Labor—Complaint—Insufficiency.

1. The complaint in an action to recover compensation for extra services performed, which fails to state any time or basis for computing the claim, is indefinite.—Donovan v. Bull Mountain Trading Co., 87.

Same—When Void for Indefiniteness.

2. An agreement, verbal or written, to be binding, must be sufficiently definite to enable the court to fix an exact meaning upon it, and if it is so vague and indefinite as to make it impossible to collect from it the full intention of the parties, it is void.—Donovan v. Bull Mountain Trading Co., 87.

Same—Work and Labor—Extra Compensation—Void for Indefiniteness.

3. *Held*, under the above rule (paragraph 2) that an oral statement alleged by plaintiff to have been made to him by the president of a mercantile establishment that there would be "no limit" to his salary, but that it was to be "commensurate with the earnings" of the company, was too indefinite to constitute a contract for compensation for services in addition to his regular salary.—Donovan v. Bull Mountain Trading Co., 87.

Same—*Quantum Meruit*—Special Contract—Measure of Recovery.

4. Where recovery is sought on *quantum meruit* and the evidence reveals a special contract, the measure of recovery must be limited to the amount so specified.—Donovan v. Bull Mountain Trading Co., 87.

Sales—Breach—Nominal Damages Recoverable, When.

5. A violation of a valid contract, unless excusable or justifiable, is an invasion of the injured party's legal rights for which he may recover nominal damages without proof of actual damages.—Whitelaw v. Vallance, 172.

Same—Loss of Business and Profits—Special Damages—Complaint.

6. Damages for loss of business and profits resulting from a breach of contract are special in character, in the sense that, while flowing from the action of the defendant, they are not such a necessary result thereof as that they will be implied by law, and must be pleaded.—Whitelaw v. Vallance, 172.

Same—Complaint—Nominal Damages.

7. Under a complaint alleging that plaintiff had purchased potatoes from defendants at a stated price and offered to receive and pay for them on a certain date, but that defendants failed to make delivery, plaintiff was entitled to no more than nominal damages.—Whitelaw v. Vallance, 172.

Same—Special Damages—Evidence—Erroneous Admission.

8. Admission of evidence showing special damages under a complaint alleging general damages only was error.—Whitelaw v. Vallance, 172.

Same—Time of Performance—Complaint—Insufficiency.

9. Where the contract of purchase of potatoes for the breach of which damages were sought was silent as to the time of their delivery, and the complaint did not allege any date or that delivery should be made within a reasonable time, the pleading was insufficient.—Whitelaw v. Vallance, 172.

Same—Breach of Contract—Market Value—Evidence—Sufficiency.

10. Where, in an action for breach of contract of sale of hay, the verdict was based on a market value of nineteen dollars per ton, the testimony on that issue ranging from fifteen dollars to twenty-six dollars per ton, the award was not open to the objection that it was not supported by the evidence because no evidence was given placing the value at that exact amount, since substantial evidence showing a valuation in excess of that returned warranted a verdict in the smaller amount.—Sturm & Drake v. Roberts Elevator Co., 239.

Same—Substantial Damages—Plaintiff may Recover, When.

11. Under sections 6056 and 6082, Revised Codes, evidence that the market price of the hay purchased by plaintiff, at time and place of delivery, was in excess of the contract price was sufficient to entitle it to substantial damages for defendant's failure to deliver it, even though plaintiff's evidence did not show that it

suffered actual damage by having to go into the open market and purchase hay to fill its own contracts or supply its own needs.—Sturm & Drake v. Roberts Elevator Co., 239.

Same—Breach—Counterclaims—Loss of Business—Special Damages—Pleading.

12. In an action to recover the purchase price of brick, in a counterclaim to which defendant averred under a general allegation that he had been damaged in a certain amount by plaintiff's failure to deliver the entire number of merchantable brick contracted for, by reason of which he was delayed in his building operations, the expense incurred in replacing defective brick was not recoverable in the absence of an allegation specially pleading such item of damage.—Humber v. Marshall, 267.

Same—Measure of Damages—Instructions—Refusal, When Proper.

13. Where the court had properly instructed the jury that defendant was not entitled to recover any damages on his counterclaim, it, as properly, refused an instruction defining the measure of his damages in that behalf.—Humber v. Marshall, 267.

Right of Action by Third Party—Complaint.

14. To entitle a third person to enforce a contract made between two others, under section 4970, Revised Codes, the complaint must show that it was expressly made for his benefit, or for the benefit of a class of persons to which he belongs, *i. e.*, he, or they, either must be named therein or otherwise sufficiently described or designated; the fact that the contract may incidentally benefit him or them, being insufficient.—McKeever v. Oregon Mortgage Co., Ltd., 270.

Action by Third Party—Complaint—Insufficiency.

15. The complaint in an action by the vendors of land to recover the balance of the purchase price from a mortgage company which loaned the money to the vendee, setting forth the mortgage contract and alleging that the company had arranged with one of plaintiffs to hold the balance due until patent for the land should be received and recorded and then pay it directly to her, *held*, insufficient, under the rule above, in the absence of an averment that the contract contained a provision that the mortgage was made expressly for the benefit of plaintiffs or either of them.—McKeever v. Oregon Mortgage Co., Ltd., 270.

Real Property—Sale—Deed—What Does not Constitute.

16. A deed claimed to have been tendered by plaintiff vendor, in an action for the cancellation of a contract for the conveyance of land, to the vendees in which no grantor was named and which named the vendor and his wife as grantees and was executed by themselves, was not entitled to any consideration as a deed.—Hogsed v. Gillett, 467.

Same—Contract of Sale—Time—Tender of Deed—When too Late.

17. Where time was made of the essence of a contract of sale of land and the vendees under its terms could at any time tender final payment and demand a deed on or before a certain date, and did so but the vendor failed to comply, a tender made at the trial which was long after the time within which it should have been executed, came too late to deprive the vendees of the right to rescind.—Hogsed v. Gillett, 467.

Same—Imperfect Title—Rescission.

18. Under the rule that rescission lies for any breach of contract of so material and substantial a nature as would constitute a de-

fense to an action brought by the party in default for a refusal to proceed with the contract, *held*, that where vendor could not give vendees a deed conveying a good title at any time prior to the date mentioned in a contract of sale because he had no title to convey, rescission in favor of vendees was properly decreed.—Hogsed v. Gillett, 467.

Same—Good Title—Vendor must be Able to Convey at Time Fixed in Contract.

19. While a vendor is not required to have a perfect title at the time he enters into a contract to sell the land or at all times between the date of the contract and the time conveyance is to be made, he must have title at the time of performance; otherwise rescission may be decreed.—Hogsed v. Gillett, 467.

Land Contracts—Fraud—Rescission—Election of Remedies.

20. Where a contract for the purchase of land was procured through false representations whereby the vendee has been deceived and defrauded, he has an election of remedies: he may stand upon the contract and sue for damages, or rescind the contract, but cannot pursue both.—Smith v. Christe, 604.

Same—Duty of Party Desiring to Rescind.

21. Under section 5065, Revised Codes, one desiring to rescind a contract must act promptly upon discovery of the facts which entitle him to rescind and he is aware of his right to rescind, and restore or offer to restore, to the other party everything of value which he has received from him under the contract.—Smith v. Christe, 604.

Same—Rescission—Waiver.

22. Plaintiff brought action to rescind a land contract on the ground of fraud, and recover damages resulting from defendant's breach. He alleged that defendant had fraudulently represented to him, in the late fall when the contract was made, that the land was free from fan weed, and testified that in the spring he discovered that the land was overrun with the weed. Four months thereafter he served notice upon defendant that he desired to rescind and tendered back a deed to the premises, but continued to occupy them until the date of the trial, about a year from the date when he first became aware of the alleged fraud, and harvested and sold a crop of wheat therefrom. *Held*, that plaintiff, by his conduct in retaining possession of the land, exercising acts of ownership of it, and retaining the benefits therefrom, waived his right to rescind.—Smith v. Christe, 604.

CONTRIBUTORY NEGLIGENCE.

See Personal Injuries; Railroads, 9, 10.

CONVERSION.

Chattel Mortgaged Property—Liability of Buyer With Notice.

1. Where a mortgage on a crop of beets was recorded in the office of the county clerk and recorder of the county in which the land on which they were to be grown was situated, a sugar company which had entered into a contract with the predecessor of the mortgagor to buy them when grown and therefore had no vested interest in them until delivery, which took place at a time when the mortgagee was entitled to their possession, had constructive notice of the mortgage and became liable to the mortgagee as for conversion.—United States National Bank v. Great Western Sugar Co., 342.

Same—Liability of Buyer of Chattels Mortgaged.

2. A chattel mortgagee may maintain an action for conversion against the purchaser of the property upon the latter's appropriation thereof to his own use, the mortgagee having at the time the right of possession and the obligation for which the mortgage was given being unpaid.—United States National Bank v. Great Western Sugar Co., 342.

Same—Consent to Sale—Nonliability of Buyer.

3. A chattel mortgagee who consents to the sale of the mortgaged property cannot maintain an action in conversion against the purchaser.—United States National Bank v. Great Western Sugar Co., 342.

Same—When Mortgagee may Maintain Action Against Buyer.

4. To entitle a chattel mortgagee to maintain an action in conversion against the buyer of the mortgaged property, he must have been entitled to its possession at the time of the alleged conversion. United States National Bank v. Great Western Sugar Co., 342.

CORPORATIONS.

Corporate Funds—Payment of Personal Obligations from—When not Illegal.

1. Where the entire capital stock of a corporation was owned by two persons, the corporation functioning only for their benefit, they could properly use corporate funds to pay their personal obligations. United States Gypsum Co. v. Mackey Wall Plaster Co., 132.

Capital Stock—Pledges—Sale Without Opportunity in Pledgor to Offset Claim—Redemption—When Proper—Equity.

2. Defendant company had leased its property to plaintiff with privilege of purchasing it for $50,000, $15,000 of which was due at the time a note for $8,000 made by two individual defendants owning all its capital stock to plaintiff fell due, which note had been secured by a pledge of capital stock of defendant company of the value of $19,000, the pledge agreement providing that upon failure to pay the note at maturity, the pledgee could sell the stock upon five days' notice and without advertising it for sale. Before due date of the note, the two individual defendants authorized plaintiff to deduct the amount due on the note from the $15,000 due defendant company. This plaintiff refused to do and sold the stock to itself for $99. *Held*, in an action by plaintiff to have itself judicially determined a stockholder in defendant company, that in view of the unfair and unconscionable conduct of plaintiff by which the individual defendants were deprived of an opportunity to offset their claim against that due it from plaintiff, the district court, sitting in equity, properly decreed that the sale of the stock should be set aside and the individual defendants permitted to redeem the stock with moneys deposited in court for that purpose. (MR. JUSTICE HOLLOWAY dissenting.)—United States Gypsum Co. v. Mackey Wall Plaster Co., 132.

Foreign Corporations—Capital Stock—Certificate of Increase—Filing Fee—Statute—Unconstitutionality.

3. *Held*, that section 165, Revised Codes, requiring the secretary of state to collect a graduated fee for the filing of certificates of incorporation and increase of capital stock, based upon the entire capital stock, is invalid as to a foreign corporation engaged both in interstate and intrastate business and only a portion of whose capital stock is represented by property owned and business done

by it in this state, as in contravention of the commerce and due process of law clauses of the federal Constitution.—J. I. Case Threshing Machine Co. v. Stewart, 380.

Same—Capital Stock—Certificate of Increase—Filing Fee—Statutes—Unconstitutionality.

4. Section 165, Revised Codes, imposing upon the secretary of state the duty to collect a fee for filing a certificate of increase of the capital stock of a foreign corporation doing an intrastate business, only a small portion of which stock is represented by property owned and business transacted within the state, which fee is computed upon its entire capital stock as increased, *held* invalid as violative of the due process of law clause of the federal Constitution.—General Electric Co. v. Stewart, 387.

COSTS.

Receivers—Taxation of Costs—Error—Review.

1. Error in the taxation of costs incident to a receivership is reviewable on appeal from the judgment.—United States Gypsum Co. v. Mackey Wall Plaster Co., 132.

Same—Costs—To Whom Taxable.

2. Costs of a receivership are properly taxable against the party whose wrongful acts made his appointment necessary and at whose instance he was appointed, where no exceptional facts appear which require the court, in the exercise of its discretion, to tax them against the party in whose favor the equities were found.—United States Gypsum Co. v. Mackey Wall Plaster Co., 132.

COUNTIES.

Subject to Legislative Control.

1. Counties are political subdivisions of the state and as such subject to legislative supervision and control.—Majors v. County of Lewis & Clark, 608.

Jails—Federal Prisoners—Compensation.

2. Under section 9763, Revised Codes, counties must furnish the use of their jails without compensation for the accommodation of federal prisoners, the United States government being required to pay for their support or subsistence only.—Majors v. County of Lewis & Clark, 608.

Same—Federal Prisoners—Subsistence—Contract With United States—Parties.

3. *Held,* that the provision of section 5547, United States Revised Statutes, making it the duty of the Attorney General of the United States to contract with "the managers or proper authorities having control" of federal prisoners in county jails for their subsistence, contemplates that the contract shall be made with the sheriffs and not with the boards of county commissioners, the former, under Code provisions, being the custodians of the jails and answerable for the safekeeping of the persons therein confined.—Majors v. County of Lewis & Clark, 608.

Same—Federal Prisoners—Subsistence—Compensation—To Whom Due.

4. Where a contract for the subsistence of federal prisoners in a county jail was entered into between the Attorney General of the United States and the board of county commissioners instead of with the sheriff as it should have been (par. 3 above), the funds received by the county for such service inured to the benefit of the

sheriff were not public funds and had no place in the county treasury.—Majors v. County of Lewis & Clark, 608.

Same—Board of Prisoners—Statutory Provision—Applicable to What State Prisoners Only.

5. Section 3138, Revised Codes, limiting the fees of the sheriff for the board of prisoners to fifty cents per day for each prisoner, has reference to prisoners confined by state authority and not to federal prisoners.—Majors v. County of Lewis & Clark, 608.

COUNTY ATTORNEYS.

Objectionable remarks at criminal trial—Record,—see Criminal Law, 51, 52.

COURTS.

See District Courts; Justice Courts; Federal Courts; Police Courts; Supreme Court; United States Supreme Court.

CRIMINAL LAW.

Police courts—Conviction for violation of penal ordinances—Appeal by cities does not lie,—see Cities and Towns, 6.

Circumstantial Evidence—Insufficiency.

1. Where, in a criminal cause, a conviction is sought upon circumstantial evidence, the criminatory circumstances proved must be consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any rational hypothesis other than guilt, mere suspicions or probabilities, however strong, being insufficient.—State v. Schrack, 70.

Larceny—Evidence—Insufficiency.

2. In a prosecution for larceny of a calf, evidence reviewed and *held* insufficient to sustain a conviction, under the above rule.—State v. Schrack, 70.

Attempted Rape—Exhibits—Torn and Bloody Clothing—Prejudice—Presumption.

3. In a prosecution for attempted rape, the introduction in evidence of the clothing worn by the prosecuting witness, though immaterial, was not reversible error, where there was no evidence that the articles were muddy, torn and blood-stained, as claimed, and thus likely to inflame the minds of the jurors, and where the original exhibits were not certified to the supreme court for inspection; prejudice cannot be presumed, but must be made to appear affirmatively.—State v. Prouty, 310.

Same—Injuries—Evidence—Inflaming Minds of Jury—Harmless Error.

4. Where, in a prosecution for attempted rape, there was not any controversy as to the time when and the place where injuries were sustained by the prosecuting witness in jumping from plaintiff's rapidly moving automobile upon defendant's threat to repeat the assault, evidence relating to the injuries held not objectionable as calculated to inflame the minds of the jury.—State v. Prouty, 310.

Same—Evidence—Admissibility—Exception Necessary.

5. Where, after objection, a question was withdrawn and not answered, though the court had overruled the objection, no exception being reserved, the same question was propounded to another witness, without objection, and answered, alleged error in permitting the second question to be answered held not reviewable, in the absence of express exception thereto.—State v. Prouty, 310.

Same—Rulings on Evidence—Exceptions must be Reserved.

6. The rule declared by Chapter 135, Laws of 1915, *inter alia* providing that every ruling or decision of the district court on the admissibility of evidence shall be deemed excepted to, has reference to civil, not criminal cases.—State v. Prouty, 310.

Same—Credibility of Prosecuting Witness—Question for Jury.

7. The credibility of the prosecuting witness in a prosecution for attempted rape was a matter for determination by the jury, and its verdict of guilty establishes the truth of her testimony for all purposes.—State v. Prouty, 310.

Trial—Technicalities.

8. A mere *apex juris* is not sufficient cause for the reversal or modification of a judgment.—State v. Prouty, 310.

New Trial—Newly Discovered Evidence—Affidavit of Defendant Required.

9. Failure of defendant to show by his own affidavit that alleged newly discovered evidence was not known to him at the time of the trial warrants refusal to grant a retrial, affidavits of others in that regard being, as a general rule, insufficient.—State v. Prouty, 310.

Same—What is not "Newly Discovered Evidence."

10. An affidavit in support of a motion for a new trial following a conviction for attempted rape that the prosecuting witness, some five months before the trial, said to affiant that, if defendant didn't "fork over," she "would send him over the road for the rest of his life," was not "newly discovered evidence" within the meaning of section 9350, Revised Codes, that expression meaning evidence discovered since the trial.—State v. Prouty, 310.

Murder—Demonstrative Evidence—Admissibility.

11. Demonstrative evidence is relevant and admissible, when it shows the commission of the crime or throws light on the way it was committed.—State v. Byrne, 317.

Same—Exhibits—Admissibility.

12. The bullet extracted from the body of deceased, bullets, empty shells and a cap found in the room where the homicide occurred, firearms and gloves found at the place where defendant was arrested, were all admissible under the rule that articles which are shown to have been connected with the commission of a crime, are admissible in evidence if they are properly identified and there has been no substantial change in them.—State v. Byrne, 317.

Same—Evidence—Parts of Body of Deceased—When Admissible.

13. Parts of the body of deceased may be exhibited to the jury in a homicide case, if first identified and shown to be in the same condition as when found or as at the time of burial.—State v. Byrne, 317.

Same—Skull of Deceased Admissible in Evidence, When.

14. Where the wounds from which deceased died consisted of a blow on the head and a shot through the body inflicted at the same time and by the same parties, admission of the skull in evidence was proper as a part of the testimony of the physician on the stand, in illustration of the character and extent of the injuries.—State v. Byrne, 317.

Same—Evidence—Map of *locus in quo*, admissible.

15. A map prepared by the county surveyor illustrating the place where the homicide occurred and testified to by him as being correct was properly admitted in evidence.—State v. Byrne, 317.

Same—Declaration of Co-conspirator—When Admissible.

16. Evidence of the driver of an automobile in which defendant with three others were riding that upon his inquiry where they

wanted to go, one of them directed him to the place of the homicide, was properly admitted, since all acted together and the direction was given without protest from defendant.—State v. Byrne, 317.

Same—Uncertain Identification of Defendant—Refusal to Strike—Harmless Error.

17. Refusal to strike the testimony of the wife of deceased that she "seemed to think" that it was the shorter of two men who struck deceased was not reversible error, where she also testified that the man in the lead dealt the blow and defendant admitted that he was the first man entering the room where the killing took place.—State v. Byrne, 317.

Same—Jury—General Challenges—Proper Denial.

18. General challenges of jurors "for the purposes of the record" who while stating on their *voir dire* that they had read the newspaper account of the killing of deceased and were of the opinion at the time that he had been murdered, did not state that they had any belief that defendant had committed the crime, but did say that they would follow the instructions of the court and render an impartial verdict, were properly denied.—State v. Byrne, 317.

Same—Trial—Reception of Verdict—Presence of Defendant—Minutes of Court—Sufficiency.

19. The contention that defendant was not present when the verdict was received, *held* without merit, where the minutes of the clerk recited, that, trial being resumed, "each party being present represented by counsel," rebuttal testimony was heard, the jury instructed, and the cause argued, that the jury retired and later returned in open court and submitted their verdict, which was filed and read by the clerk in open court, no statement appearing that any adjournment of the court was had from the time it convened on that day to the filing and reading of the verdict.—State v. Byrne, 317.

Same—Conversation in Presence of Defendant—Identification—Evidence—Sufficiency.

20. Testimony as to a conversation had in the presence of defendant, a Greek, with others engaged with him in the commission of the homicide of which he was convicted was admissible though the witness was unable to positively identify defendant as having been present, merely referring to him as a Greek, where the identification was made complete by other testimony, including that of defendant, who understood the English language.—State v. Chronopoulos, 329.

Grand Larceny—Ownership of Property—Evidence—Insufficiency.

21. In a prosecution for grand larceny the information charged defendant, while acting as cashier of a bank, with having stolen a Liberty Bond, the property of one L. and purchased by him on the installment plan. The bond was one of a number subscribed for by the bank to a reserve bank and held in trust for the individual subscribers until full payment therefor was made by them. *Held,* that title to the bond in question was in the bank, and did not pass to L., under section 4632, Revised Codes, until it was identified on delivery to L. upon final payment, and that, therefore, at the time of the alleged offense, several months prior to delivery, he was not the owner thereof.—State v. Wallin, 332.

Same—Property in Defendant's Possession by Virtue of Office—Information—Insufficiency.

22. An information charging that, while acting as cashier of a bank, defendant feloniously converted a Liberty Bond to his own use, was

insufficient for failure to allege that the bond came into his possession by virtue of his office.—State v. Wallin, 332.

Larceny by Bailee—Evidence—Insufficiency.

23. Where the legal title to a bond was in a bank as trustee and possession of it in the cashier only by virtue of his office, a prosecution against the latter under subdivision 2 of section 8642, Revised Codes, under a charge of larceny by bailee, could not be maintained.—State v. Wallin, 332.

Same—Criminal Intent—Evidence—Insufficiency.

24. Since, to constitute the crime of larceny there must have been a criminal intent to permanently deprive the owner of the property taken, evidence showing that defendant cashier delivered a Liberty Bond held in trust by his bank for a subscriber, in behalf of his bank as collateral security to another bank, with the intention that it should be redeemed within a short time, which was done before the information against him for larceny was filed, *held* insufficient to support a verdict of guilty.—State v. Wallin, 332.

Criminal Law—Conviction for Crime not Charged Unauthorized.

25. Conviction cannot be had of one offense upon an information which charges an entirely distinct and unrelated crime.—State v. Wallin, 332.

Arson—Evidence—Admissions—Stenographer's Notes—Portions Only Admitted—When not Reversible Error.

26. Where, in a prosecution for arson, portions of the testimony of a stenographer given from notes taken in the county attorney's office relating to admissions made by defendant, were admitted in evidence over objection of defendant that all of it should be introduced, his counsel, after cross-examination of the witness at length, refused to have it all made a part of the record at the suggestion of the court and the county attorney, he was in no position to complain.—State v. Bennett, 355.

Same—Circumstantial Evidence—Sufficiency.

27. In a prosecution for arson, evidence, circumstantial in character, which showed that defendant had insured the property in the building used for business and living purposes; had sent his family to the country a few days before the fire and removed several boxes of family belongings; was in the building a very short time before the fire was discovered in three different places where piles of excelsior and other inflammatory material had been prepared, *held* sufficient to justify conviction, under the rule that on circumstantial evidence conviction cannot be had unless all the circumstances are consistent with each other and with the hypothesis of guilt, and inconsistent with any other rational hypothesis.—State v. Bennett, 355.

Same—Motive—Direct Proof not Necessary.

28. Motive for the commission of crime need not be proved directly by the prosecution, but may be inferred from attendant and surrounding circumstances, and from previous occurrences referring to and connected with the commission of the offense.—State v. Bennett, 355.

Same—New Trial—Newly Discovered Evidence—Affidavits—Insufficiency.

29. Affidavits in support of a motion for new trial on the ground of newly discovered evidence will not be considered, where it is not shown that the matters therein contained were not discovered and known by defendant before the conclusion of the trial.—State v. Bennett, 355.

Receiving Stolen Property—Flight of Defendant—Erroneous Instruction—Assumption of Guilt.

30. In a prosecution for receiving stolen property the undisputed evidence in which showed that the property was received by defendant and no one else, and instruction that if the jury believed from the evidence beyond a reasonable doubt that after the commission of a crime with which he was charged he fled, the fact of his flight might be taken into consideration in determining his guilt or innocence of the charge against him, was prejudicial as assuming the commission of the offense and thus the guilt of defendant.—State v. Bonning, 362.

Same—Flight of Defendant—Admissibility of Evidence—Exception to Rule.

31. Evidence of flight or concealment of one charged with crime is, generally, evidence of guilt and admissible; but where the accused fled while under a charge entirely different from the one for which he was on trial, evidence of his flight was inadmissible.—State v. Bonning, 362.

Same—Flight of Defendant—Evidence—Admissibility—When Exception to Rule not Applicable.

32. Where defendant fled while under a charge of larceny, evidence of his flight was admissible in a prosecution under an information charging him with receiving the same property knowing it to have been stolen, the facts involved having been the same and the only difference in the two charges one in the statement of defendant's relation to such facts.—State v. Bonning, 362.

Grand Larceny—Possession of Recently Stolen Property.

33. While mere possession of recently stolen property is not sufficient to justify conviction for larceny, such fact, supplemented by others inconsistent with the idea that the possession is honest, makes a case sufficient to submit to the jury.—State v. Evans, 367.

Same—Possession of Recently Stolen Property—Sufficiency of Case to Go to Jury.

34. In the absence of direct and positive evidence that defendant stole a steer with the larceny of which he was charged, his possession of the meat of the animal and his exercise of ownership over it, under circumstances indicating knowledge of where the animal came from, furnished a basis for the inference that he killed it, sufficient to justify submission of the case to the jury.—State v. Evans, 367.

Same—Recently Stolen Property—Burden of Proof.

35. In a prosecution for grand larceny, an instruction on the effect of possession of stolen property, which did not charge that, if defendant's explanation raised a reasonable doubt, the burden was on the state to prove the falsity thereof, was not erroneous, in view of other instructions meeting such objection, which were not objected to.—State v. Evans, 367.

Same—Reasonable Doubt—Improper Instruction.

36. An instruction that where the evidence shows that the property charged to have been stolen was stolen by someone, and that the defendant was recently in possession of it, it is wholly immaterial how strong the state's case may be, he cannot be convicted if the evidence offered by him is sufficient to raise a reasonable doubt of his guilt, though the explanation may not be reasonable, probable, satisfactory or true, was properly refused, the substance thereof having been covered by other instructions, and the form of it objectionable.—State v. Evans, 367.

Same—Instructions—Proper Refusal When Subject Covered by Other Instructions.

37. The refusal of an instruction in a larceny case that there must be, in addition to proof of possession of the stolen property, proof of corroborating circumstances tending of themselves to establish guilt, was not error, the court having charged the jury that mere possession of such property was not sufficient to justify conviction, and that, in addition to personal and exclusive possession involving a distinct and conscious assertion of property rights by defendant, there must be other evidence.—State v. Evans, 367.

Appeal and Error—Instructions—When not Reviewable.

38. Under section 9271, Revised Codes, only those instructions to which objection was made at the time of settlement can be considered on appeal.—State v. Evans, 367.

Prostitution—White Slavery—Evidence—Insufficiency.

39. Where, under an information charging defendant with a violation of the White Slavery Act (Chap. 1, Laws 1911), in aiding an unmarried woman to obtain transportation from one county to a point in another county, the evidence of the state disclosed no more than that the accused on a certain day conveyed the woman from one point to another in the same county after which they were not again seen together until some five months thereafter, when they were found in another state living together in a state of adultery, it was insufficient to warrant conviction under the information.—State v. Berndt, 377.

Grand Larceny—Guilt of Defendant Established—When New Trial not to be Granted.

40. Where the record conclusively establishes the guilt of the defendant charged with crime, a new trial will not be granted even though there was error on the trial, unless it clearly appears that such error actually prejudiced him in his right to a fair trial.—State v. Stevens, 390.

Same—Mental Attitude of Defendant—Evidence—Admissibility.

41. In a prosecution for grand larceny, a statement of accused, made shortly before the commission of the crime, that it was unfair for some to have millions and others no money, that it should be distributed equally, and that most of the rich, including the president of the bank for which he worked and from which he stole, got their money by robbing the poor *etc.*, *held* admissible to show the mental attitude of defendant toward private rights in property as well as his prejudice against persons who have acquired property.—State v. Stevens, 390.

Same—"Confession"—"Admission"—Definition.

42. A "confession" is an acknowledgment in express terms, by a party in a criminal case, of his guilt of the crime charged, while an "admission" is a statement by the accused, direct or implied, of facts pertinent to the issue, and tending, in connection with proof of the other facts, to prove his guilt, but of itself insufficient to authorize a conviction.—State v. Stevens, 390.

Same—Admissions Against Interest—Admissibility.

43. While confessions may not be received in evidence unless shown to have been made voluntarily, admissions against interest are admissible without such a foundation having been laid, the party charged to have made them being permitted to show the circumstances under which they were made, for consideration of the jury in determining their weight.—State v. Stevens, 390.

Same.

44. Statements of one accused of grand larceny that two others were to meet him and divide the money, that his superior officer in the bank to which the money belonged told him to bring it to him from the postoffice, he to receive part of it, and that, on his way to the bank with the money, he stepped into an empty building, where two men received the money, knocked him down, went with him to the back of a house, where they gagged him, and that he was to meet them afterward and receive his share, were admissions, not confessions, being mere statements of the fact from which guilt might be inferred, but not acknowledgments thereof, and therefore admissible without first showing they were made voluntarily.—State v. Stevens, 390.

Same—Contradictory and False Statements—Admissions.

45. Statements made by defendant, claimed by him to have been confessions, which were contradictory of each other and false and used by the state, not as confessions, but as showing his attitude toward the crime, though on a different state of facts, *held* admissible as admissions against interest.—State v. Stevens, 390.

Same—Motive—Efforts to Borrow Money—Admissible in Evidence.

46. Evidence of efforts on the part of defendant charged with larceny to obtain a loan shortly prior to its commission was admissible to show an inducement or motive for the crime.—State v. Stevens, 390.

Same—Failure of Defendant to Testify—Instruction—Harmless Error.

47. Where defendant did not testify in his own behalf, an instruction in the words of section 9484, Revised Codes, that if defendant does testify, the jury, in judging of the credibility and weight of his testimony, may take into consideration the fact that he is the defendant and the nature and enormity of the crime, though unnecessary, was harmless.—State v. Stevens, 390.

Same—Money Surreptitiously Taken from Postoffice—Jurisdiction.

48. The fact that defendant bank employee surreptitiously secured the money with the larceny of which he was charged from the United States postoffice, and thus also committed an offense against the federal law, did not deprive the state court of jurisdiction to try the cause as for a crime committed under its statute, the jurisdictions not being conflicting.—State v. Stevens, 390.

Same—Admissions Against Interest—Whole of Statement to be Considered by Jury.

49. In considering statements against interest made by defendant after the charge for which he is on trial was made, the jury should take into consideration the whole statement or conversation, in view of the likelihood of the witness to forget or misunderstand what was said or intended.—State v. Stevens, 390.

Same—Admissions—Self-serving Declarations—Inadmissibility.

50. Evidence of statements in behalf of the party making them is not competent; hence an instruction that defendant was entitled to the benefit of what he said in his own behalf in certain admissions was properly refused.—State v. Stevens, 390.

Same—Trial—Objectionable Remarks by County Attorney—When not Reviewable.

51. Where the county attorney's argument to the jury is not shown in the record, and the portions of it deemed objectionable are not settled in any way by the court, error in this regard cannot be considered on appeal.—State v. Stevens, 390.

Same—Trial—Remarks by County Attorney—Context must be Shown.

52. A single statement or remark of the county attorney in his address to the jury, apart and separate from the connection in which it was used, is incapable of accurate interpretation, and hence determination of whether it was prejudicial to defendant, impossible.—State v. Stevens, 390.

Same—Admissions—Improper Persuasion and Inducements—Not Ground for New Trial.

53. Alleged improper methods consisting of persuasion and inducements to secure from defendant a statement as to the truth of defendant's connection with the larceny charged against him went to the weight of the statement as evidence for the jury's determination, and did not constitute a ground for a new trial, the interests of defendant having been fully protected on the trial in this respect.—State v. Stevens, 390.

Same—Newly Discovered Evidence—New Trial—When not to be Granted.

54. A new trial asked for on the ground of newly discovered evidence, based on a stipulation of counsel that after trial and sentence events occurred which showed that defendant did not profit from his crime, but that others obtained the money from the place where it was hidden by defendant, cannot be granted by the supreme court for the purpose of enabling him to obtain a lighter sentence than the court imposed in the absence of such knowledge.—State v. Stevens, 390.

Sedition — Information — Conclusions — Inferences — Innuendoes — Insufficiency.

55. Since ultimate facts constituting the crime charged, and not conclusions drawn by the pleader from the facts, must be stated in an information, clauses following each of several alleged seditious utterances explaining and interpreting what defendant meant by the language used, *held* improper in an information charging sedition under Chapter 11, Extra. Session 1918.—State v. McGlynn, 416.

Same—Information—Insufficiency.

56. An information charging defendant with saying that the injuries to Belgian children exhibited in the United States were sustained in factories, and were not the result of German atrocities; that the murder of the Armenians was nothing; that the Armenians were heathens; that it was a mean trick for Germans to mutilate and mangle American prisoners of war, *held* not to charge sedition as defined in Chapter 11, Laws Extra. Session 1918.—State v. McGlynn, 416.

Same—Information—Certainty.

57. In view of the provision of section 9149, Revised Codes, requiring that the information must be direct and certain, *inter alia*, as to the particular circumstances of the offense charged when they are necessary to constitute a complete offense, an information charging one with seditious utterances should set forth the fact whether the words were uttered in private conversation with a single person or from a public platform, or were disseminated through the medium of printed articles.—State v. McGlynn, 416.

Obtaining Money Under False Pretenses—Attempts—Evidence—Insufficiency.

58. Evidence, in a prosecution for attempt to obtain money under false pretenses, showing no more than guilty intent in defendant and preparation to commit the offense charged, *held* insufficient to sustain a conviction.—State v. Tripp, 421.

Murder—Change of Venue—Discretion.

59. An application for change of place of trial of a criminal cause is addressed to the sound discretion of the court, the ruling of which will not be disturbed on appeal unless abuse thereof is shown.—State v. Davis, 426.

Same—Change of Venue—Local Prejudice—Newspaper Articles—Affidavits—Conclusions—Insufficiency.

60. Where affidavits of counsel for defendant filed in support of a motion for change of place of trial of a charge of murder did not contain extracts from alleged inflammatory newspaper articles circulated in the county, and the record on appeal did not present the *voir dire* examination of the jurors as tending to show any unusual circumstances in obtaining a jury, the mere statements therein that there had been talk of lynching and that the tale of the crime had been printed in newspapers and generally read by the inhabitants of the county, were bald conclusions and properly disregarded by the trial court.—State v. Davis, 426.

Same—Exhibits—Identifications—Evidence—Sufficiency.

61. Under the rule that to warrant the admission in evidence of the weapon with which the crime for which defendant is on trial was committed a *prima facie* showing of its identity and connection with the offense is sufficient; clear, certain and positive proof not being required, evidence held sufficient to admit a revolver and the shells with which it was loaded found near the scene of the crime.—State v. Davis, 426.

Same—Insanity—Evidence Incidentally Showing Prior Conviction and Escape from Prison—Admission not Error.

62. Where, in a prosecution for murder, the defense is insanity, every act of defendant in his life is subject to scrutiny; hence the fact that a deputy warden of the state prison was permitted to state while testifying on the question of defendant's sanity that he first met him in the prison as a convict and that he had twice escaped therefrom was not objectionable as an endeavor to prejudice the jury by showing that he had been previously convicted of crime, although he was not charged with prior conviction.—State v. Davis, 426.

Same—Technical Errors—Insufficient to Reverse Judgment.

63. A conviction will not be set aside for technical errors or defects appearing in the record which do not affect the substantial rights of the accused.—State v. Davis, 426.

Same—Insanity—Opinion Evidence of Layman—Harmless Error.

64. Error in permitting a layman to give his opinion as to defendant's sanity without having qualified under subdivision 10 of section 7887, Revised Codes, as an intimate acquaintance, was harmless where the only evidence of defendant's insanity consisted of his behavior on the stand and of his incoherent and meaningless answers, all the witnesses testifying to his mental condition declaring him sane, without contradiction or conflict.—State v. Davis, 426.

Same—Justification or Mitigation—Burden of Proof—Correct Instruction.

65. The contention of defendant that since no one was present when the shot which killed deceased was fired, the court erred in giving an instruction in the words of section 9282, Revised Codes, heretofore construed to mean that if the jury should find the fact that defendant did the killing, the burden of proving circumstances mitigating the offense from murder to manslaughter or justifying it devolves upon him, unless the evidence which proves

the killing by the defendant also shows that it was manslaughter or justifiable, *held* without merit.—State v. Davis, 426.

Intoxicating Liquors—Witnesses—Former Conviction of Misdemeanor—Improper Cross-examination.

66. *Held*, that the provision of section 8907, Revised Codes, to the effect that the conviction of a person of any offense may be proved for the purpose of affecting the weight of his testimony, refers to conviction for a felony, and that therefore refusal to permit cross-examination of a witness for the state as to his former conviction of a misdemeanor was proper.—State v. Stein, 441.

Same—Misconduct of Jury—Verdict—Impeachment by Affidavit.

67. Since a juror may not impeach his verdict directly by affidavit, impeachment thereof is not permissible by the affidavit of another detailing admissions and declarations made by the juror after trial showing that he was prejudiced while acting as such.—State v. Stein, 441.

Same—New Trial—Newly Discovered Evidence—Rule.

68. Where alleged newly discovered evidence is merely cumulative and designed to impeach the credibility of a witness further than it has already been impeached, a new trial cannot be granted.—State v. Stein, 441.

Same—New Trial—Motion Based on Documentary Evidence—Review on Appeal.

69. As a rule the supreme court is more reluctant to set aside an order granting than one refusing a new trial, but where the motion was based entirely upon documentary evidence, it is in as advantageous a position to pass upon its merits as was the trial court, and will set aside the order if from the record it is unable to ascertain upon what theory the motion could have been granted.—State v. Stein, 441.

Same—Trial—Absent Witnesses—Continuance—Insufficient Affidavit.

70. An affidavit, filed on the day set for trial, in support of a motion for a continuance on the ground of the absence of witnesses, which fails to disclose the date upon which such witnesses left the state, is insufficient.—State v. Showen, 474.

Same—Continuance—Affidavit—Contents.

71. An affidavit of the character of the above must disclose specifically the facts expected to be proved by the absent witness, and set forth that if such witnesses were present they would testify to those facts; the general statement that, if present, they would testify to facts material to affiant's defense being insufficient.—State v. Showen, 474.

Same—Continuance—Cumulative Evidence—Affidavit—Contents.

72. An affidavit of the nature above, must also disclose that the facts which defendant expects to prove by the absent witnesses cannot be proved by other witnesses available at the trial; since a continuance for the purpose of obtaining evidence which would be merely cumulative need not be granted.—State v. Showen, 474.

Same—Continuance—Discretion.

73. Granting or refusing a continuance of the trial of a criminal case rests in the sound discretion of the court, and unless the record shows an abuse of discretion, its action will not be interfered with on appeal.—State v. Showen, 474.

Same—Preparation for Trial—Time—Sufficiency.

74. Under Section 9237, Revised Codes, the defendant is entitled to at least two days to prepare for trial; therefore where he had seven months from the day of entry of his plea to the day of trial for preparation, he had no cause for complaint in this regard.—State v. Showen, 474.

Same—Selection of Jury—Recourse to Jury-box No. 3—When Proper.

75. In a criminal prosecution, where the regular panel of jurors had been so far depleted that a sufficient number did not remain from which to obtain a jury, and a sufficient number could not be obtained otherwise without great delay and expense, the court did not err in directing a special venire drawn from jury-box No. 3 to complete the jury.—State v. Showen, 474.

Same—When Recourse to Special Venire not Improper.

76. Where the record discloses that defendant did not exhaust his peremptory challenges and that he was accorded a fair trial, the contention that the court erroneously excused members of the regular panel, making recourse to a special venire necessary, is without merit, unless, by rejecting qualified persons, the necessity of accepting others not qualified had been purposely created.—State v. Showen, 474.

Same—Detectives—Evidence—Admissibility.

77. Testimony of detectives employed by a county to ferret out violations of the prohibition law and to secure evidence upon which to base prosecutions was admissible; the credibility and weight to be given it being matters for consideration by the jury, to whose attention the fact of their employment and the terms thereof had been brought by cross-examination.—State v. Showen, 474.

Homicide—Change of Venue—Local Prejudice—Proper Denial.

78. Evidence produced by defendant in support of his motion for change of venue on account of local prejudice, consisting of six affidavits and the oral statements of three witnesses, to the effect that because of prejudice against defendant, under charge of murder, he could not secure a jury in the county which would give him a fair and impartial trial, *held* insufficient to show that the trial court abused its discretion, where the state produced affidavits of more than a hundred persons from all parts of the county, deposing that in their respective neighborhoods there existed no prejudice against him, and where the *voir dire* examination of the jury disclosed that of the forty talesmen called, only fourteen were excused because they had formed on opinion upon the merits of the case.—State v. Bess, 558.

Same—Change of Venue—Newspaper Accounts—When Insufficient to Show Prejudice.

79. Before the effect of newspaper articles giving an account of a murder can be pronounced so highly prejudicial as to warrant a change of venue, it must be shown that they were passionate enough to excite undue prejudice, to the extent of rendering it impossible for accused to secure a jury free from exception.—State v. Bess, 558.

Same—Evidence—Reading Extracts from Text-books—When Permissible.

80. Where defendant's counsel, on cross-examination of a physician, had read from a medical text-book, and, for the purpose of discrediting witness, asked him if he agreed with a certain portion of the statement of the author upon the effect produced by hard-nosed bullets, and if a soft-nosed bullet would not mushroom as soon as it struck tissue, the state was properly permitted on redirect, for the

opposite purpose, to read the entire statement upon the subject and ask the witness if he agreed with it.—State v. Bess, 558.

Same—Firearms—Experts—Admissibility of Evidence.

81. A hunter and an ex-soldier who had qualified as experts in the use of a rifle were properly permitted to testify as to the effect of hard and soft nosed bullets to rebut testimony in support of defendant's theory that the death of deceased was caused by a hard-nosed bullet.—State v. Bess, 558.

Same—Experts—Specific Instances—Harmless Error.

82. Though the practice of calling for specific instances to qualify a witness to give expert evidence should not be sanctioned, the admission of testimony of an ex-soldier as to particular instances of the effect of hard-nosed and soft-nosed bullets on soldiers of the United States in France was not reversible error where his answers were more favorable to defendant than to the state, and therefore harmless.—State v. Bess, 558.

Same—Experts—Foundation for Opinions—Evidence.

83. One offering an expert as a witness, for the purpose of showing the strength of the opinion he is about to give, may have him specify in detail the observations on which the opinion is based, and the opposite party on cross-examination may call for the particular observations of the witness, and probe the underlying facts to the fullest extent for the purpose of affecting the strength of the opinion expressed.—State v. Bess, 558.

Same—Alibi—Instructions—Refusal, When not Error.

84. Instructions that the burden was on the state to prove that defendant was present at and participated in the homicide, and that, if it failed to prove such facts beyond a reasonable doubt, the jury must acquit him, were properly refused, defendant having tendered no instruction defining the term "alibi" in such words that the jury could not have misunderstood the issue presented.—State v. Bess, 558.

Same—Alibi—Refusal of Instruction—When Harmless.

85. Where from the entire charge the jury must have fully understood that if they entertained a reasonable doubt whether defendant was so far away from the scene of the shooting that he could not have done it, he must be acquitted, refusal of offered instructions to the effect that the burden of proving his presence or participation in the crime was upon the state, and that, failing to sustain such burden, acquittal should follow, was not reversible error.—State v. Bess, 558.

Same—Instructions—Justification—Mitigation—Burden of Proof.

86. In a prosecution for murder, where the fact that defendant killed deceased was established, and there were no circumstances tending to justify or excuse the act, it was not error to instruct, in the language of section 9282, Revised Codes, that, the commission of the homicide being proved, the burden of proving circumstances of mitigation, justification, or excuse devolved on defendant, unless the state's proof showed the crime amounted only to manslaughter, or that defendant was justified or excusable.—State v. Bess, 558.

Same—Trial—Jury—Separation—Striking Affidavits—When not Reversible Error.

87. Where all the jurors and bailiffs, testified that the jury was kept together, heard no other evidence than that adduced on the trial, communicated with no one, and that no facts other than those in

evidence were considered by them, it was not reversible error to strike out affidavits to the effect that they were not kept together during the trial and their deliberations, since the result would have been the same had the court considered the question on the merits.—State v. Bess, 558.

Receiving Stolen Property—Venue—Proof Required.

88. In a prosecution for receiving stolen property, the state must prove the venue as laid in the information, by evidence which establishes the fact beyond a reasonable doubt.—State v. Ducolon, 594.

Same—When Crime Complete and Venue Fixed.

89. When property is received with knowledge that it was stolen, and with the criminal intent defined by the statute, the crime is complete and the venue fixed.—State v. Ducolon, 594.

Same—Venue—*Corpus Delicti*—Circumstantial Evidence—When Sufficient.

90. The venue as well as the *corpus delicti* in a prosecution for receiving stolen property may be established by circumstantial evidence, provided the criminatory circumstances proved are consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis.—State v. Ducolon, 594.

Same—Venue—Evidence—Insufficiency.

91. In the absence of direct evidence showing that defendant, who was found in the possession of stolen cattle in a county other than the one in which he was charged with having received them, came into their possession in the county in which the venue was laid, and of circumstantial evidence sufficient to meet the requirements of the rule above (par. 88), the trial court was without jurisdiction to render a judgment of conviction.—State v. Ducolon, 594.

Evidence—Preponderance Insufficient.

92. In criminal law the doctrine of bare preponderance of evidence has no place.—State v. Ducolon, 594.

Rape—Evidence—Insufficiency.

93. Where, in a prosecution for rape, the testimony of the prosecuting witness was so unnatural, unreasonable and improbable as to render belief impossible, a physician expressing the opinion that her story as to what occurred was impossible under any circumstances, and there was other testimony impeaching her and tending to show that defendant lacked opportunity to commit the crime, judgment of conviction reversed with direction to dismiss the cause and discharge defendant. (MR. JUSTICE REYNOLDS dissenting, being of opinion that a new trial should be ordered.)—State v. McIlwain, 598.

CROSS-EXAMINATION.

Impeachment of witness by showing prior conviction of a misdemeanor improper,—see Criminal Law, 66.

Improper exclusion,—see Evidence, 22.

CURING ERROR.

See Appeal and Error, 7; Instructions, 3.

DAMAGES.

Inadequacy—When new trial will not be ordered,—see Personal Injuries, 24.

Nominal and special,—see Contracts, 5–8.

Quantum meruit—Special contract,—see Contract, 4.

Malicious Prosecution—Improper Element of Damage.

1. Money paid by plaintiff to an attorney in opposition to extradition proceedings which, after a preliminary hearing, he abandoned and returned to Montana voluntarily, was too remote an element of damages, and an instruction that the jury might take this item of expense into consideration in arriving at their verdict was error.—Hawley v. Richardson, 118.

Sales—Substantial Damages—Plaintiff may Recover, When.

2. Under sections 6056 and 6082, Revised Codes, evidence that the market price of the hay purchased by plaintiff, at time and place of delivery, was in excess of the contract price was sufficient to entitle it to substantial damages for defendant's failure to deliver it, even though plaintiff's evidence did not show that it suffered actual damage by having to go into the open market and purchase hay to fill its own contracts or supply its own needs.—Sturm & Drake v. Roberts Elevator Co., 239.

"General" and "Special" Damages—Definition.

3. "General damages" are such as naturally and necessarily result from the act of which complaint is made; while "special damages" are such as are the natural, but not the necessary, consequences of such act.—Sankey v. Chicago, Mil. & St. P. Ry. Co., 242.

Carriers—Delay in Shipment of Freight—Special Damages—Notice to Carrier of Urgency of Shipment Necessary.

4. In order to charge a carrier with special damages arising from delay in the shipment of freight, such as stock feed, notice of the urgency of the shipment must be brought home to the carrier.—Sankey v. Chicago, Mil. & St. P. Ry. Co., 242.

Same—Special Damages.

5. Plaintiff delivered a quantity of stock feed to defendant railway company for shipment to his place of residence, but did not notify it that it was for immediate use, that he was without feed or that the damages claimed by him as having resulted to his stock from failure of prompt shipment might reasonably be expected to flow therefrom. The shipment was not made on the day after receipt because of lack of equipment, nor on the second day, a Sunday, no trains being run over the road on Sundays, but was made on the third day. *Held*, that the damages sued for were special, and that, therefore, under the above rule (par. 4) defendant was not liable in the absence of notice of the urgency of the shipment.—Sankey v. Chicago, Mil. & St. P. Ry. Co., 242.

Ejectment—Right to Nominal Damages—Insufficient to Warrant Reversal of Judgment.

6. Where, in an action in ejectment, the property involved consisting of mining claims, the only meritorious claim for damages was based upon an encroachment of plaintiff's land by the erection of a toilet erected for temporary use, the injury complained of was too small to be a basis for the computation of damages, unless merely nominal, and therefore insufficient to warrant reversal of the judgment otherwise proper.—Pioneer Mining Co. v. Bannack Gold Min. Co., 254.

Sales—Breach—Counterclaims—Loss of Business—Special Damages—Pleading.

7. In an action to recover the purchase price of brick, in a counterclaim to which defendant averred under a general allegation that he had been damaged in a certain amount by plaintiff's failure to deliver the entire number of merchantable brick contracted for, by

reason of which he was delayed in his building operations, the expense incurred in replacing defective brick was not recoverable in the absence of an allegation specially pleading such item of damage. Humber v. Marshall, 267; see, also, Whitelaw v. Vallance, 172.

Same—Measure of Damages—Instructions—Refusal, When Proper.

8. Where the court had properly instructed the jury that defendant was not entitled to recover any damages on his counterclaim, it was properly refused an instruction defining the measure of his damages in that behalf.—Humber v. Marshall, 267.

DEATH.

Action for damages,—see Personal Injuries.

DECLARATIONS.

Self-serving—Inadmissibility,—see Evidence, 20.

DEEDS.

What does not constitute a deed,—see Contracts, 16.

Tender, when too late,—see Contracts, 17.

DEFENSES.

Inconsistent—Waiver—Election of remedies,—see Pleading and Practice, 31, 32.

DEMURRER.

Overruling—Service of notice by mail,—see Pleading and Practice, 11–14.

DETECTIVES.

Evidence—Admissibility,—see Evidence, 23.

DEVISES.

Death of devisee before death of testator—Effect,—see Executors and Administrators, 7.

DISBARMENT.

See Attorney and Client, 3.

DISCRETION.

Awarding alimony,—see Husband and Wife, 8.

Custody of minor children,—see Husband and Wife, 9.

Denial of new trial, when abuse of discretion,—see New Trial, 2; Personal Injuries, 13.

Granting change of venue,—see Change of Venue, 1.

Granting or refusing continuance,—see Criminal Law, 73.

Question whether diligence was exhibited in bringing motion for new trial to hearing,—see New Trial, 8.

Taxation of costs in receivership proceeding,—see Costs, 2.

DISTRICT COURTS.

Minutes—What does not constitute conviction,—see Verdicts 3.

DIVORCE.

See Husband and Wife, 3–9.

EASEMENTS.

See, also, Real Property, 1–3; Mines and Mining, 10–12.

Rights of Way—Ditches—Canals.

1. A right of way, and the right to a ditch, canal or other structure in which water is conveyed for irrigation or other lawful purposes, are easements over the land occupied by the ditch, canal, *etc.*—Mannix v. Powell County, 510.

Definition.

2. An "easement" is an appurtenance to land, and constitutes an interest in real property.—Mannix v. Powell County, 510.

Quieting Title—Action Lies.

3. *Held*, under section 6870, Revised Codes, as amended by Chapter 113, Laws of 1915, that an action lies to quiet title to an easement to a right of way for a ditch as against a county in exclusive use of the land for highway purposes. (MR. CHIEF JUSTICE BRANTLY dissenting.)—Mannix v. Powell County, 510.

EJECTMENT.

See Husband and Wife, 7; Mines and Mining, 10–13; Real Property, 15–20.

ELECTION OF REMEDIES.

Pleading inconsistent defenses,—see Pleading and Practice, 31.

Land Contracts—Fraud—Rescission.

1. Where a contract for the purchase of land was procured through false representations whereby the vendee has been deceived and defrauded, he has an election of remedies: he may stand upon the contract and sue for damages, or rescind the contract, but cannot pursue both.—Smith v. Christe, 604.

EQUITY.

See, also, particular subjects relating to Equity.

Findings, when conclusive,—see Findings, 1, 2.

Laches,—see Husband and Wife, 7.

Redemption of pledged corporate stock,—see Corporations, 2.

ESCAPE.

Flight of defendant charged with crime—Evidence—Admissibility,—see Criminal Law, 30–32.

From prison—Evidence on issue of insanity of defendant incidentally disclosing escape—Admissibility,—see Criminal Law, 62.

ESTATES OF DECEASED PERSONS.

See, also, Executors and Administrators.

Accounting,—see Partnership, 1–3.

Claims against, by surviving partner—Presentation for allowance,—see Partnership, 3.

Claims against—Payment—Judgment of federal court—*Res adjudicata*,—see Judgments, 6, 7.

Partial distribution—When proper—Executors and administrators may not petition for,—see Executors and Administrators, 4, 9.

ESTOPPEL.

Error by officers of Land Department does not estop federal government,—see Real Property, 11.

EVIDENCE.

See, also, Circumstantial Evidence; Criminal Law; Witnesses.

Curing error in admission,—see Instructions, 3.

When verdict not conclusive because conflict in evidence,—see Personal Injuries, 8.

Admissibility Under Pleadings.

1. Under the allegations of the complaint in a personal injury action, after more minutely describing plaintiff's injuries, that his body had been "otherwise injured," evidence that he had sustained a rupture was admissible over the objection that such injury was not within the pleadings.—Zanos v. Great Northern Ry. Co., 17.

Improper Admission—Cautionary Instruction—Curing Error.

2. Error in the admission in evidence of immaterial and incompetent matters was cured by an instruction taking from the jury any consideration thereof, the presumption obtaining that they followed the instruction.—Newton v. City of Roundup, 24.

Jury may not Arbitrarily Disregard Unimpeached Testimony.

3. Juries may not arbitrarily and capriciously disregard the testimony of witnesses which is unimpeached in any of the usual modes known to the law and supported by all the circumstances in the case. Casey v. Northern Pacific Ry. Co., 56.

When Physical Facts Controlling Over Testimony.

4. Where physical conditions surrounding an accident point so unerringly to the truth as to leave no room for a contrary conclusion based on reason or common sense, the mere fact that testimony is introduced in conflict with them is not sufficient to make a case for the jury.—Casey v. Northern Pacific Ry. Co., 56.

When Court may Disregard Unimpeached Testimony.

5. A court may reject the most positive testimony of a witness though not discredited by direct evidence impeaching him or contradicting his statements, where his story is inherently improbable, creditable swearing only concluding its judgment.—Casey v. Northern Pacific Ry. Co., 56.

Self-contradictory Statements—How Viewed on Appeal.

6. In determining whether testimony of a party is sufficient to support a verdict in his favor, his case may be judged by that portion of his self-contradictory testimony which is least favorable to him.—Casey v. Northern Pacific Ry. Co., 56.

Estimates of Distances—Exact Measurements Controlling.

7. Under the rule that proof of actual measurements is so far superior to an estimate of distances that no issue for the jury is raised by a conflict between the two, measurements made by a civil engineer between points on a railway track an exact determination of which was vital in the trial of an action by a locomotive engineer who was injured by a collision were controlling over mere estimates made by plaintiff who by his testimony had demonstrated that he was without capacity for judging distances or colored his statements to meet the exigencies of his case.—Case v. Northern Pacific Ry. Co., 56.

Malicious Prosecution—Evidence of Plaintiff's Discharge—When Parol Evidence Admissible.

8. The best evidence of plaintiff's discharge after preliminary examination on a charge of grand larceny was the indorsement on the warrant on which he was arrested, and not the entries on the magistrate's docket; but upon proof of the loss of the warrant, parol evidence was admissible to prove the fact of his discharge.—Hawley v. Richardson, 118.

Same—Parol Evidence of Entries in Justice's Docket, When Admissible.

9. Where the entries in a justice's docket in the matter of plaintiff's arraignment on a charge of grand larceny were incomplete and unintelligible, parol testimony was admissible to show that a preliminary examination was had.—Hawley v. Richardson, 118.

Admissions Need not be Proved.

10. Facts admitted by the answer need not be proved.—Hawley v. Richardson, 118.

Order of Proof—Discretion.

11. The order of proof is a matter largely confided to the discretion of the trial court.—Hawley v. Richardson, 118.

Malicious Prosecution—Warrant of Arrest—Best Evidence—Parol Evidence—Harmless Error.

12. In the absence of proof of the loss or destruction of the warrant on which plaintiff, in an action for malicious prosecution, was arrested and brought into court, parol evidence of its contents or of the contents of the indorsement thereon was erroneously admitted; error, however, *held* to have been cured by subsequent proof of loss of the warrant.—Hawley v. Richardson, 118.

Notice—Service by Mail—Extension of Time for Answer—Distance Between Places of Deposit and Address—Judicial Notice.

13. In determining whether the time for answering, after demurrer overruled was extended one day for every twenty-five miles distance between the place of deposit of notice, served by mail, and place of address, courts may take judicial notice of the distance between the place where mailed and the place of address.—Batchoff v. Butte Pacific Copper Co., 179.

Personal Injuries—Death by Negligence—Earning Capacity—Immaterial Evidence.

14. Where the complaint in an action to recover damages for the death of a miner from a street railway company alleged that decedent had been earning, and was capable of earning, $4 per day, evidence as to wages paid miners at the time of the trial was immaterial and properly excluded.—Osterholm, Admr., v. Butte Electric Ry. Co., 193.

Same—Intoxication—Evidence—Admissibility.

15. Proof of decedent's intoxication at the time he was struck by a street-car while attempting to cross the street at a place where there was no crossing was admissible.—Osterholm, Admr., v. Butte Electric Ry. Co., 193.

Sales—Breach of Contract—Market Value—Evidence—Sufficiency.

16. Where, in an action for breach of contract of sale of hay, the verdict was based on a market value of nineteen dollars per ton, the testimony on that issue ranging from fifteen dollars to twenty-six dollars per ton, the award was not open to the objection that it was not supported by the evidence because no evidence was given placing the value at that exact amount, since substantial evidence showing a

valuation in excess of that returned warranted a verdict in the smaller amount.—Sturm & Drake v. Roberts Elevator Co., 239.

Real Property—Resulting Trusts—Conveyances Between Husband and Wife—Character of Evidence Required.

17. Where it is sought to establish a resulting trust by reason of a conveyance made by or on behalf of a husband to his wife, the evidence establishing such trust must be clear, convincing and practically free from doubt, especially so where the wife is dead and the husband must establish his case by his own testimony as to the oral conversations between himself and deceased.—Clary v. Fleming, 246.

Witnesses—When Mental Incompetents may Testify.

18. The testimony of an incompetent person is admissible in evidence if the court is satisfied that he has sufficient mentality to appreciate the nature and obligation of an oath and is capable of giving a correct account of the matters which he has seen or heard with reference to the question at issue, his incompetency going only to the weight of his evidence.—Martin v. Hoover, 302.

Admissibility—Exception Necessary.

19. Where, after objection, a question was withdrawn and not answered, though the court had overruled the objection, no exception being reserved, the same question was propounded to another witness, without objection, and answered, alleged error in permitting the second question to be answered held not reviewable, in the absence of express exception thereto.—State v. Prouty, 310.

Self-serving Declarations—Inadmissibility.

20. Evidence of statements in behalf of the party making them is not competent; hence an instruction that defendant was entitled to the benefit of what he said in his own behalf in certain admissions was properly refused.—State v. Stevens, 390.

Insanity—Opinion Evidence of Layman—Harmless Error.

21. Error in permitting a layman to give his opinion as to defendant's sanity without having qualified under subdivision 10 of section 7887, Revised Codes, as an intimate acquaintance, was harmless where the only evidence of defendant's insanity consisted of his behaviour on the stand and of his incoherent and meaningless answers, all the witnesses testifying to his mental condition declaring him sane, without contradiction or conflict.—State v. Davis, 426.

Negligence—Exoneration—Cross-examination—Improper Exclusion.

22. Plaintiff having testified that the threshing-machine engine sparks from which were alleged to have set his grain stacks on fire, had been placed to the windward of the stacks by defendant, refusal to permit the latter to testify on cross-examination that the engine had been placed where it was by direction of plaintiff over defendant's objection that it was dangerous, was error.—O'Neil v. Christian, 460.

Detectives—Evidence—Admissibility.

23. Testimony of detectives employed by a county to ferret out violations of the prohibition law and to secure evidence upon which to base prosecutions was admissible; the credibility and weight to be given it being matters for consideration by the jury, to whose attention the fact of their employment and the terms thereof had been brought by cross-examination.—State v. Showen, 474.

Homicide—Reading Extracts from Text-books—When Permissible.

24. Where defendant's counsel, on cross-examination of a physician, had read from a medical text-book, and, for the purpose of discrediting witness, asked him if he agreed with a certain portion of the

statement of the author upon the effect produced by hard-nosed bullets, and if a soft-nosed bullet would not mushroom as soon as it struck tissue, the state was properly permitted on redirect, for the opposite purpose, to read the entire statement upon the subject and ask the witness if he agreed with it.—State v. Bess, 558.

Same—Firearms—Experts—Admissibility of Evidence.

25. A hunter and an ex-soldier who had qualified as experts in the use of a rifle were properly permitted to testify as to the effect of hard and soft-nosed bullets to rebut testimony in support of defendant's theory that the death of deceased was caused by a hard-nosed bullet.—State v. Bess, 558.

Same—Experts—Specific Instances—Harmless Error.

26. Though the practice of calling for specific instances to qualify a witness to give expert evidence should not be sanctioned, the admission of testimony of an ex-soldier as to particular instances of the effect of hard-nosed and soft-nosed bullets on soldiers of the United States in France was not reversible error where his answers were more favorable to defendant than to the state, and therefore harmless.—State v. Bess, 558.

Same—Experts—Foundation for Opinions—Evidence.

27. One offering an expert as a witness, for the purpose of showing the strength of the opinion he is about to give, may specify in detail the observations on which the opinion is based, and the opposite party on cross-examination may call for the particular observations of the witness, and probe the underlying facts to the fullest extent for the purpose of affecting the strength of the opinion expressed.—State v. Bess, 558.

Criminal Law—Evidence—Preponderance Insufficient.

28. In criminal law the doctrine of bare preponderance of evidence has no place.—State v. Ducolon, 594.

EXCEPTIONS.

See, also, Bills of Exceptions.

Once saved, saved for all purposes,—see Pleading and Practice, 27.
To rulings of evidence necessary,—see Appeal and Error, 16; Evidence, 19.

EXECUTORS AND ADMINISTRATORS.

See, also, Estates of Deceased Persons.

Accounting to representative of deceased partner,—see Partnership, 1–3.
Action by administrator for death of intestate—When complaint setting forth damages sustained by heirs not open to demurrer on ground of misjoinder of parties,—see Personal Injuries, 17.

Judgment Against Executors and Administrators—Establishment of Claim
ate.
nent against an executor or administrator upon a claim estate establishes the claim to be paid in due course of n.—In re Smith's Estate, 276.

Executors and Administrators—Binding upon Whom.
nent against the executor or administrator of an estate a judgment against the estate, and all persons interested , whether they be heirs, legatees or creditors, as privies d by it on the merits of the claim.—In re Smith's Estate,

Same—Who are Privies.

3. Privies are those who are so connected with the parties in estate, or blood or in law, as to be identified with them in interest, and consequently to be affected with them by the litigation, such as heir and ancestor, executor and testator, *etc.*—In re Smith's Estate, 276.

May not Petition for Partial Distribution.

4. While an executor (or administrator) may resist an application for partial distribution, in the absence of statute permitting him to petition for such distribution, he has no right to do so, the right to so petition being only conferred upon heirs, devisees and legatees by sections 7664 and 7669, Revised Codes, and the court was therefore without jurisdiction to entertain his petition.—In re Fratt's Estate, 526.

Wills—"Devise"—"Bequest"—Definition.

5. A "devise" is a gift of real property, and a "bequest" a gift of personal property, by will.—In re Fratt's Estate, 526.

Same—Lapsed Legacies Pass as Intestate Property.

6. *Held*, under section 4789, Revised Codes, that legacies to one who died before the testatrix, lapsed upon the latter's death, and were distributable to her heirs under the laws governing intestacy.—In re Fratt's Estate, 526.

Same—Devises—Death of Devisee Before Death of Testator—Effect.

7. The word "devised" used in section 4758, Revised Codes, providing that if any estate is *devised* to any relative of the testator, and the devisee dies before the testator, leaving lineal descendants, they take the estate so given in the same manner the devisee would have done had he survived testator, *held* to mean a gift of real property by will, and not a gift of personal property.—In re Fratt's Estate, 526.

Same—Trusts—When Beneficiary not Entitled to Interest or Income.

8. Where a will bequeathed $50,000 in trust to the niece of testatrix and devised to her also in trust certain city lots and $150,000 to be used for the erection of a business block thereon, she to receive the income from the building, the will providing that none of the bequests should bear interest, she was not entitled to any interest on the $50,000 until it was invested, and not to any income with respect to the $150,000 until the building was erected and rentals received.—In re Fratt's Estate, 526.

Estates of Deceased Persons—Partial Distribution—When Proper.

9. Where, on a petition for partial distribution, it was shown that there were no debts, that due notice to creditors of the estate had been given, that the time during which claims should be filed or presented had expired, and that the estate had funds and securities amply sufficient to cover a bequest to a niece in trust and the amount necessary to erect a building which the trustees were directed to construct on lots given her in trust, the lots, the amount of the bequest, and the amount needed to erect the building should have been set aside to the trustee, under section 7669, Revised Codes.—In re Fratt's Estate, 526.

Same—Inheritance Tax—Life Estates—Remainder not Taxable, When.

10. Since inheritance taxes are not imposed upon the property which passes by will or succession, but upon the privilege of so taking, and a person cannot be taxed for more than he receives, where property was left to a niece for life, the remainder to go to her lineal descendants if she left any, and, if not, to others named, thus

leaving it indeterminable in whom or when, the remainder of the estate would vest, the remainder interests were not taxable to her, and she was only liable for the tax based on the value of her life estate.—In re Fratt's Estate, 526.

EXHIBITS.

Admissibility,—see Criminal Law, 3, 11–15, 61.

EXPERT WITNESSES.

Firearms,—see Evidence, 25, 26.

Opinion evidence—Admissibility,—see Evidence, 27.

Reading from text-books—When not permissible,—see Evidence, 24.

Specific instances—Erroneous admission—Harmless error,—see Evidence, 26.

EXPLOSIVES.

Sale of, in violation of Ordinance,—see Personal Injuries, 2.

FALSE PRETENSES.

See Criminal Law, 58.

FEDERAL COURTS.

See, also, United States Supreme Court.

Conclusiveness of judgments—Federal questions,—see Judgments, 6, 7, 12, 13.

Jurisdiction of offense against federal and state laws,—see Criminal Law, 48.

FEDERAL PRISONERS.

Sheriffs entitled to compensation received by counties for subsistence of,—see Counties, 2–5.

FEES.

Fees for filing certificate of increase of capital stock,—see Corporations, 3, 4.

FENCES.

Partition Fences—Limitations—Premature Construction—Nonsuit.

1. Section 2087, Revised Codes, provides that where one of several occupants of lands belonging to them in severalty desires a partition fence, the others must, within six months after written notice to that effect, construct their portion of such fence, failing in which the person giving notice may build it and recover the proportion of the expense due from them. Plaintiff in an action to recover by contribution defendant's share of a partition fence, two days before the expiration of the six-month period began its construction. *Held*, that defendant was entitled to the full period of six months before default could be predicated upon his failure to act, and that by acting before its expiration plaintiff forfeited his cause of action for contribution.—Briggeman v. Corrigan, 205.

FINDINGS.

Appeal does not lie from order rejecting or adopting findings or from action of court in making findings of its own,—see Appeal and Error, 29.

Equity—Accounting—Conflicting Evidence—When Findings Conclusive.

1. Where the evidence in an action for an accounting, tried by a jury, is in substantial conflict, the burden rests upon appellant to show that its preponderance was decisively in his favor before a reversal of the judgment on the ground that the findings are not supported by the evidence may be had.—Mason v. Swee, 32.

Same—Evidence—Showing Necessary for Reversal.

2. While the findings of a jury in an equity case are only advisory and may be adopted or rejected, yet where the trial court by their adoption approved them, a showing that there is a clear preponderance of the evidence against them is necessary before they will be disturbed on appeal.—Mason v. Swee, 32.

FIREARMS.

Expert witnesses—Evidence—Admissibility,—see Evidence, 24–27.

FIRES.

Destruction of grain by sparks from threshing machine,—see Negligence, 29, 30.

FIREWORKS.

Sale of, in violation of ordinance,—see Personal Injuries, 2.

FLUMES.

See Mines and Mining, 10–12.

FOREIGN CORPORATIONS.

Capital stock—Certificate of increase—Filing fees,—see Corporations, 3, 4.

FRAUD.

See, also, Brokers, 1.

Breaking of Promise not Fraud Without Intent not to Keep It.

1. The mere making of a promise which the promisor fails to keep does not constitute actionable fraud, intention not to keep it when it was made, being necessary to constitute the promisor's action fraudulent, under section 4978, Revised Codes.—International Harvester Co. v. Merry, 498.

FUGITIVES.

Flight of defendant—Evidence—Admissibility,—see Criminal Law, 30–32.

GIFTS.

When conveyance from husband to wife deemed a gift,—see Husband and Wife, 5.

GRAND LARCENY.

See Criminal Law, 2, 21–25, 33–37, 40–54.

HARMLESS ERROR.

See Appeal and Error; Criminal Law; Curing Error.

HEALTH INSURANCE.

See Insurance, 1–3.

HEIRSHIP.

See, also, Executors and Administrators.

Heirs joined as parties plaintiff with administrator in action for damages for death of intestate not misjoinder,—see Personal Injuries, 17.
Heirs—Sufficiency of Allegation—Inferences,—see Personal Injuries, 18.

HOMICIDE.

See Criminal Law, 11–20, 60–65, 78–87.

HUSBAND AND WIFE.

Authority of Wife to Employ Counsel for Husband.

1. Under section 6480, Revised Codes, providing that if a husband and wife be sued together the wife may defend for her own right, and if the husband neglects to defend, she may defend for his right also, a wife, pending suit for divorce brought by her, had authority to employ counsel on behalf of her husband, in a suit for partition against both of them in which he had failed to appear.—Buckhouse v. Parsons, 156.

Attorney and Client.

2. An attorney who had been employed by the wife of a husband who had deserted her, to represent him in a partition suit against both, could lawfully pay to the wife the amount awarded to the husband, and was not liable to the latter therefor.—Buckhouse v. Parsons, 156.

Conveyances—Divorce—Collusion—Public Policy.

3. An agreement between husband and wife, whereby the latter promised to convey a lot to the former in consideration of his failure to fight a divorce action instituted by her, was collusive and void as against public policy.—Clary v. Fleming, 246.

Property Settlements—Must be in Writing.

4. An agreement between husband and wife providing for a property settlement between them must, under section 3695, Revised Codes, be in writing.—Clary v. Fleming, 246.

Real Property—Resulting Trusts—Conveyances Between Husband and Wife—Gifts—Presumptions.

5. The rule declared by section 4538, Revised Codes, that where real property is conveyed to one person and the consideration therefor is paid by another, a trust is presumed to result in favor of the person paying the consideration, *held*, subject to the exception that where the property is purchased by one with his own money and the title is placed by him in another to whom he stands in a confidential relation, such as husband, wife, parent, child, *etc.*, the presumption, rebuttable in character, is that the conveyance is made as a gift.—Clary v. Fleming, 246.

Same—Resulting Trusts—Conveyances Between Husband and Wife—Character of Evidence Required.

6. Where it is sought to establish a resulting trust by reason of a conveyance made by or on behalf of a husband to his wife, the evidence establishing such trust must be clear, convincing and practically free from doubt, especially so where the wife is dead and the husband must establish his case by his own testimony as to oral conversations between himself and deceased.—Clary v. Fleming, 246.

Same—Resulting Trusts—Equity—Laches.

7. In an action in ejectment in which defendant sought to establish a resulting trust in property conveyed to his wife, the consideration for which was paid by him, *held*, that by waiting ten years before

asserting his claim, the wife in the interim having secured a divorce, remarried and died, she in her lifetime paying the taxes, rented and in every way treated it as her own, he was guilty of such laches as precluded his right to appeal to a court of equity for relief.—Clary v. Fleming, 246.

Divorce—Alimony—Discretion.

8. Plaintiff, in an action for divorce on the ground of extreme cruelty, had no property in her own right or means of support and was in ill health; the estate of defendant amounted to approximately $20,000 over and above his just debts and liabilities; the court awarded plaintiff $50 per month permanent alimony. *Held*, in view of the provision of section 3677, Revised Codes, vesting in the district court absolute discretion as to the alimony to be paid by the husband, and the fact that the trial court had jurisdiction to modify its order relating to alimony at any time when considered necessary or desirable, that the decree in this respect was not open to reversal in the absence of a showing of abuse of discretion.—Boles v. Boles, 411.

Same—Minors—Custody—Discretion—Presumptions.

9. Where the district court found that defendant was a man much attached to his minor children, had at all times provided for them in a suitable manner and taken much interest in their education and general welfare, was a fit and proper person to have their care and custody, that the children had expressed a desire to live with him, and that it was for their best interest that they should be kept and raised together, and therefore awarded their custody to him, subject to the right of the mother to visit them at reasonable times, the presumption obtains, nothing appearing in the record on appeal to the contrary, that the court exercised the discretion lodged in it, and its action will be affirmed.—Boles v. Boles, 411.

INCOMPETENTS.

As witnesses,—see Witnesses, 1.

Verification of complaint by an incompetent in receivership proceeding, insufficient to authorize appointment of receiver,—see Receivers, 4.

INFANTS.

Violation of Penal Ordinances—Accountability.

1. A minor (twelve years old) is chargeable with the obligation of refraining from violation of penal statutes or city ordinances.—Jackson v. Lomas, 8.

INFERENCES.

In information—Insufficiency,—see Criminal Law, 55, 56.

Sufficiency of allegations of complaint,—see Pleading and Practice, 10.

INFORMATIONS.

Certainty required,—see Criminal Law, 57.

Conclusions—Innuendoes—Insufficiency,—see Criminal Law, 55, 56.

INHERITANCE TAXES.

Life estates—Remainder not taxable,—see Executors and Administrators, 10.

INJUNCTIONS.

Special improvements—Material departure from resolution of intention—Bonds or warrants—Issuance at discount,—see Cities and Towns, 1-3, 7-9.

INSANITY.

See, also, Incompetents.

Evidence incidentally showing prior conviction and escape from prison—Harmless error,—see Criminal Law, 62.

Opinion evidence of laymen—Harmless error,—see Criminal Law, 64.

INSOLVENCY.

Appointment of receiver without notice,—see Receivers, 2.

INSTRUCTIONS.

See, also, Criminal Law; Malicious Prosecution.

Review—Technical Niceties.

1. In reviewing instructions given to the jury substance should not be sacrificed to undue nicety in phraseology or too critical exactness in the use of words.—Zanos v. Great Northern Ry. Co., 17.

When Deemed Sufficient—Duty of Appellant.

2. Where an instruction in appropriate language calls the attention of the jury to the subject matter to be considered and fairly states and presents the questions to be determined, it is sufficient, and if in such a case a more specific instruction is required by a party, it is his duty to tender one or a modification of the one given, a demand that the court do so being sufficient.—Zanos v. Great Northern Ry. Co., 17.

Evidence—Improper Admission—Cautionary Instruction—Curing Error.

3. Error in the admission in evidence of immaterial and incompetent matters was cured by an instruction taking from the jury any consideration thereof, the presumption obtaining that they followed the instruction.—Newton v. City of Lewistown, 24.

Refusal—Repetition.

4. Refusal of a requested instruction fully covered by instructions given is not error.—Hawley v. Richardson, 118.

Erroneous Instruction not Objected to—Law of Case.

5. An erroneous instruction, given without objection, became the law of the case, the supreme court on appeal being precluded by section 9271, Revised Codes, from reversing a judgment for error in instructions not specifically pointed out and excepted to at the settlement of the instructions.—Hawley v. Richardson, 118.

Same—Conflict of Instructions—Proper Refusal.

6. Where defendant did not object to an erroneous instruction which thereupon became the law of the case, refusal to give an instruction which might properly have been given, but, if given, would have been essentially conflicting with the first, he was in no position to complain.—Hawley v. Richardson, 118.

Same—Negligence—Presumption of Due Care—Improper Instruction.

7. An instruction that the law presumes that plaintiff's decedent at the time of the accident was exercising ordinary care for his safety was properly refused where the question of negligence on the part of defendant and that of contributory negligence on his part were issues

of fact to be determined by the jury.—Osterholm, Admr., v. Butte Electric Ry. Co., 193.

Settlement of—Objections Reviewable.

8. In its review of an alleged erroneous instruction, the supreme court is limited under section 6746, Revised Codes, to the particular objection to it urged upon the trial court at the time the instructions were settled.—Humber v. Marshall, 267.

Instructions must Relate to Facts.

9. Instructions to the jury must relate to the facts given in evidence in the particular case.—State v. Evans, 367.

Negligence—Condition of Machinery—Ordinary Care—Erroneous Instruction.

10. Since the measure of defendant's duty was to exercise only ordinary care to provide a threshing-machine engine in a reasonably safe condition and to exercise the same care to maintain it in that condition, it was gross error to instruct the jury that an engine in a reasonably safe condition means one which combines the greatest safety with practical use, inasmuch as only an engine mechanically perfect could meet such requirement.—O'Neil v. Christian, 460.

INSURANCE.

Health Insurance—Nonpayment of Premium—What Does not Constitute.

1. Where plaintiff, insured against sickness, had assigned his wages to defendant company to the extent of the monthly premium due thereon, seeing to it that there was always sufficient money in the hands of his employer to meet payment, and defendant looked to the latter for payment and collected the premiums from him, the employer never refusing to pay upon demand, failure to make certain payments was ascribable to defendant and not to the insured, and therefore the policy did not lapse on account of nonpayment.—Wick v. Western Life & Casualty Co., 553.

Same—Preliminary Notice of Disability—Character of Proof.

2. *Held,* that the provision in a health policy requiring written notice within ten days after commencement of disability from sickness, must be read in connection with section 5628, Revised Codes, providing that where preliminary proof of loss is required by a policy, the insured need not give such proof as is necessary in a court of justice, it being sufficient if he give the best evidence which it is in his power to give at the time; *held,* further, that conditions may be such as to relieve insured from giving any notice whatever except that contained in his final proof of disability.—Wick v. Western Life & Casualty Co., 553.

Same—Best Notice Possible Under Circumstances—Questions for Jury.

3. Where plaintiff, two days after being taken ill, lost his senses and remained in that condition for thirty-five days, when he requested a friend to notify defendant, the questions whether the circumstances were such as to excuse the giving of the notice stipulated for in the policy, other than the proof of loss or disability, or whether he gave the best notice within his power at the time, were questions of fact for the jury.—Wick v. Western Life & Casualty Co., 553.

INTEREST.

On bequests—When beneficiary not entitled to,—see Executors and Administrators, 8.

INTOXICATING LIQUORS.

Sale,—see Criminal Law, 66–77.

Search-warrants—Improper Issuance.

1. Search-warrant *held* improperly issued, under decision in the case of *State ex rel. Samlin* v. *District Court*, 59 Mont. 600.—State ex rel. Hogue v. O'Brien, 178.

INTOXICATION.

Evidence—Admissibility,—see Personal Injuries, 20.

ISLANDS.

Patent to land abutting on river does not include,—see Real Property, 12.

JAILS.

Sheriffs entitled to compensation received by counties for subsistence of federal prisoners,—see Counties, 2–5.

JUDGMENTS.

Right to nominal damages insufficient to warrant reversal of judgment,—see Damages, 6.

On Pleadings—When Improper.

1. Where an issue of fact is raised by the allegations of the complaint by denials controverting them, a judgment on the pleadings is improper.—Aiken v. City of Glendive, 1.

Dismissal of Action—Default—Neglect to Demand Entry of Judgment.

2. The six months period at the expiration of which an action may be dismissed by the court, under section 6714, Revised Codes, if the party entitled to judgment neglects to demand and have the same entered, does not commence to run from date of entry of default, in a personal injury action, but from the date of final submission, *i. e.*, production of proof by plaintiff.—Batchoff v. Butte Pacific Copper Co., 179.

Default Judgment—Premature Entry—Error Within Jurisdiction.

3. Premature entry of default constitutes error within jurisdiction, the judgment following being voidable, not void.—Batchoff v. Butte Pacific Copper Co., 179.

Same—Refusal to Vacate—Appealable Order.

4. An order, made after judgment, denying a motion to set aside a default and judgment, is appealable under section 7098, Revised Codes; hence where no appeal was taken, the alleged error in refusing the motion was not reviewable on appeal from the judgment. (On rehearing.)—Batchoff v. Butte Pacific Copper Co., 179.

Appeal from Judgment—Record on Appeal—Bills of Exception.

5. *Held*, that the provision of section 7112, Revised Codes, requiring that the record on appeal from a final judgment shall contain the judgment and any bills of exception upon which appellant relies, refers to only such bills of exceptions as are settled under sections 6787 and 6788 or are used on motion for new trial, and that therefore any bill not so settled or used cannot be considered on such appeal. (On rehearing.)—Batchoff v. Butte Pacific Copper Co., 179.

Federal Courts—*Res Adjudicata*—Claims Against Estate—Payment.

6. Plaintiff brought action in the United States district court to recover interest due from an estate on money belonging to plaintiff

and used by decedent in his lifetime while acting as plaintiff's guardian. Defendant interposed the defenses of the statute of limitations, laches and noncompliance with the statute of nonclaim. Judgment for plaintiff was affirmed on appeal to the circuit court of appeals. Basing his claim upon the judgment thus obtained, plaintiff made demand upon the executrix for payment. The executrix submitted her final report to the state district court and petitioned for distribution of the estate and payment of outstanding claims, stating that the claim of plaintiff had not been paid. A beneficiary of decedent filed objections to payment of plaintiff's claim on grounds the same as those urged in the federal court. A trial was had in the district court sitting in probate, evidence heard and judgment rendered for plaintiff. *Held*, that the questions raised by the objections were foreclosed by the judgment of the federal court, that the judgment of that court was conclusive under the doctrine of *res adjudicata*, and that the action of the trial court in again trying the same question determined by the federal court was error.—In re Smith's Estate, 276.

Same—State Court's Refusal to Give Effect to Judgment of Federal Court—Federal Question.

7. Where a state court refuses to give effect to a judgment of the federal court upon a point in dispute, and within its jurisdiction, a federal question arises under the laws of the United States establishing the circuit court and vesting it with jurisdiction.—In re Smith's Estate, 276.

Against Executors and Administrators—Establishment of Claim Against Estate.

8. A judgment against an executor or administrator upon a claim against the estate establishes the claim to be paid in due course of administration.—In re Smith's Estate, 276.

Against Executors and Administrators—Binding upon Whom.

9. A judgment against the executor or administrator of an estate is in effect a judgment against the estate, and all persons interested in the estate, whether they be heirs, legatees or creditors, as privies are foreclosed by it on the merits of the claim.—In re Smith's Estate, 276.

Same—Who are Privies.

10. Privies are those who are so connected with the parties in estate, or blood or in law, as to be identified with them in interest, and consequently to be affected with them by the litigation, such as heir and ancestor, executor and testator, *etc.*—In re Smith's Estate, 276.

What Deemed Adjudicated.

11. A right, question or fact, distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies.—In re Smith's Estate, 276.

Decisions of Appellate Courts—Conclusiveness.

12. The judgments of appellate courts are as conclusive as those of any other courts, and they not only establish facts, but also settle the law, so that the law as decided upon any appeal must be applied in all the subsequent stages of the cause.—In re Smith's Estate, 276.

Conclusiveness of Federal Judgment.

13. The judgment or decree of a federal court is binding and perfect between the parties until reversed, without regard to any adverse opinion or judgment of any other court of merely concurrent jurisdiction, and its integrity, validity and effect are complete in all re

spects between all parties in every suit and in every forum where it is legitimately produced as the foundation of an action or of a defense, either by plea or in proof, as it would be in any other circumstances.—In re Smith's Estate, 276.

Certiorari—Satisfaction of Judgment—Subsequent Annulment Error.

14. Where a judgment rendered by a justice of the peace in an action on a promissory note and an open account had been satisfied by sale of personal property under execution, and thus ceased to exist, the district court on *certiorari*, was without power to annul and set it aside as having been entered without jurisdiction.—State ex rel. Baird v. Anderson, 515.

JUDICIAL NOTICE.

Distance between cities in state,—see Evidence, 13.

JURISDICTION.

See, also, particular court or body.

Of offense against federal and state laws,—see Criminal Law, 48.

JURY.

See, also, Change of Venue; Criminal Law; Verdicts.

Findings advisory,—see Findings, 2.

May not arbitrarily disregard unimpeached testimony,—see Evidence, 3.

Trial by—What does not constitute denial in action in ejectment,—see Real Property, 20.

Verdict—Order Setting Aside Under Guise of Correcting Minutes, Void.

1. *Held*, that a verdict arrived at, received and filed in regular manner, eight of the jurors, upon their poll, answering in the affirmative, could not be set aside on motion, supported by the affidavit of one of them to the effect that he had answered in the negative, asking specifically that it be set aside, under the pretension that its purpose was merely to correct the minutes of the court.—Currey v. Butte Electric Ry. Co., 146.

Misconduct of Jury—Verdict—Impeachment by Affidavit.

2. Since a juror may not impeach his verdict directly by affidavit, impeachment thereof is not permissible by the affidavit of another detailing admissions and declarations made by the juror after trial showing that he was prejudiced while acting as such.—State v. Stein, 441.

Selection of Jury—Recourse to Jury-box No. 3—When Proper.

3. In a criminal prosecution, where the regular panel of jurors had been so far depleted that a sufficient number did not remain from which to obtain a jury, and a sufficient number could not be obtained otherwise without great delay and expense, the court did not err in directing a special venire drawn from jury-box No. 3 to complete the jury.—State v. Showen, 474.

Same—When Recourse to Special Venire not Improper.

4. Where the record discloses that defendant did not exhaust his peremptory challenges and that he was accorded a fair trial, the contention that the court erroneously excused members of the regular panel, making recourse to a special venire necessary, is without merit, unless, by rejecting qualified persons, the necessity of accepting others not qualified had been purposely created.—State v. Showen, 474.

JUSTICE COURTS.

Judgment—Annulment after satisfaction on *certiorari* unauthorized,—see Certiorari, 1.

Entries in docket, when parol evidence admissible,—see Evidence, 9.

Cities and Towns—Police Courts—Appeal.

1. *Held*, that an appeal by a city does not lie in a cause tried under sections 9584–9628, Revised Codes, governing criminal procedure in police or justice courts.—City of Miles City v. Drum, 451.

LACHES.

Conveyance of real property from husband to wife—Resulting trust,—see Husband and Wife, 7.

LAND DEPARTMENT—FEDERAL.

Surveys—Authority of surveyors—Errors by surveyors and department—Effect—Patent,—see Real Property, 7, 9–12.

LARCENY.

See Criminal Law, 2, 21–25, 33–37, 40–54.

LAW OF CASE.

See, also, Judgments, 12.

Instruction not objected to,—see Instructions, 5.

LEGACIES.

Lapsed—Pass as intestate property,—see Executors and Administrators, 6.

LICENSE FEES.

Foreign corporations—Capital stock—Certificate of increase—Filing fees,—see Corporations, 3, 4.

LIMITATIONS OF ACTIONS.

Right of Action—Time.

1. Where a right of action granted by statute is dependent upon the expiration of a certain time, the limitation thus fixed is of the essence of the right, and one seeking to enforce it must show affirmatively that he has complied with its provisions.—Briggeman v. Corrigan, 205.

MALICIOUS PROSECUTION.

Complaint—Sufficiency.

1. Complaint in an action for malicious prosecution examined and *held* sufficient to state a cause of action.—Hawley v. Richardson, 178.

Warrant of Arrest—Best Evidence—Parol Evidence—Harmless Error.

2. In the absence of proof of the loss or destruction of the warrant on which plaintiff, in an action for malicious prosecution, was arrested and brought into court, parol evidence of its contents or of the contents of the indorsement thereon was erroneously admitted; error, however, *held* to have been cured by subsequent proof of loss of the warrant.—Hawley v. Richardson, 178.

Evidence of Plaintiff's Discharge—When Parol Evidence Admissible.

3. The best evidence of plaintiff's discharge after preliminary examination on a charge of grand larceny was the indorsement on the

warrant on which he was arrested, and not the entries on the magistrate's docket; but, upon proof of the loss of the warrant, parol evidence was admissible to prove the fact of his discharge.—Hawley v. Richardson, 178.

Proof of Filing Complaint—Presumptions.

4. Plaintiff in an action for malicious prosecution was not required to prove that the complaint against him was actually filed, where defendant admitted that he subscribed and swore to it, in view of the presumption (sec. 7962, subd. 15, Rev. Codes) arising, upon proof that a warrant was issued and proceedings had under it, that official duty was regularly performed and that the complaint was duly filed.—Hawley v. Richardson, 178.

Parol Evidence of Entries in Justice's Docket, When Admissible.

5. Where the entries in a justice's docket in the matter of plaintiff's arraignment on a charge of grand larceny were incomplete and unintelligible, parol testimony was admissible to show that a preliminary examination was had.—Hawley v. Richardson, 178.

Probable Cause—Nonprofessional Advice not Admissible in Evidence.

6. In an action for malicious prosecution, evidence that defendant in instituting the prosecution acted upon the advice of nonprofessional persons is inadmissible to show probable cause.—Hawley v. Richardson, 178.

Same—Proper Instruction.

7. An instruction that to constitute probable cause justifying the institution of a criminal prosecution, it is only necessary that there should be evidence which reasonably warrants a belief in the guilt of the accused and that it need not be sufficient to insure a conviction, properly stated the law.—Hawley v. Richardson, 178.

Malice—Want of Probable Cause—Proper Refusal of Instruction.

8. Refusal of a requested instruction that the discharge of plaintiff, in an action for malicious prosecution, by a justice of the peace, after a preliminary examination, was not any evidence whatsoever of malice on the part of defendant or of want of probable cause, from which malice may be implied, was proper.—Hawley v. Richardson, 178.

Probable Cause—Improper Instruction.

9. An instruction requested by defendant that, in determining whether there was probable cause for instituting the criminal proceedings, the jury might make some allowance for the fact that defendant felt himself injured by the offense which he alleged plaintiff had committed, and under the circumstances could not be held as likely to draw his conclusions with the impartiality of a disinterested person, *held* improper as, in effect, commenting on the evidence.—Hawley v. Richardson, 178.

Same.

10. An instruction that probable cause is a reasonable ground, or a suspicion supported by circumstances sufficiently strong in themselves to warrant an ordinarily prudent and cautious man acting impartially and honestly in believing a crime has probably been committed, was improper, as requiring the party making a criminal complaint to act with entire impartiality, and as not taking into account the circumstances surrounding him at the time.—Hawley v. Richardson, 178.

Commission of Crime—Improper Instruction.

11. An instruction offered by defendant stating, among other things, "the policy of the law is to favor prosecutions for crime" was

properly refused, as calculated to lead the jury to infer that, in the opinion of the court, plaintiff was guilty of the crime with which he had been charged by defendant.—Hawley v. Richardson, 178.

Definition of Crime Charged Against Plaintiff—Proper Instruction.

12. An instruction defining grand larceny in the language of the statute was properly given, as furnishing a standard by which the jury might determine whether the facts and circumstances were such as to warrant defendant in an action for malicious prosecution, in believing that plaintiff was guilty of that crime.—Hawley v. Richardson, 178.

Evidence—Sufficiency.

13. Evidence examined and *held* sufficient to take the case (an action for malicious prosecution) to the jury and to justify the court's refusal of a new trial.—Hawley v. Richardson, 178.

Improper Element of Damage—Instructions.

14. Money paid by plaintiff to an attorney in opposition to extradition proceedings, which, after a preliminary hearing, he abandoned and returned to Montana voluntarily, was too remote an element of damages, and an instruction that the jury might take this item of expense into consideration in arriving at their verdict was error.—Hawley v. Richardson, 178.

MAPS.

Exhibits—Admissibility,—see Criminal Law, 15.

MARKET VALUE.

Evidence—Sufficiency,—see Contracts, 10.

MASTER AND SERVANT.

See Personal Injuries.

MEASURE OF DAMAGES.

See Damages.

MINES AND MINING.

Mining Claims—Adverse Claim—Complaint.

1. In an action to determine an adverse claim to a lode mining claim, the complaint is sufficient if plaintiff by appropriate allegations shows his right to the ground covered by his location, without alleging the nature of defendant's claim, the duty of doing so devolving upon defendant.—Lehman v. Sutter, 97.

Same—Complaint—Location—Defect in Recorded Certificate—Complaint—Immaterial Allegations.

2. In view of the provision of section 2293, Revised Codes, that defects in a recorded certificate of location of a mining claim shall not be deemed material where the person relying on the defects made his location with notice thereof, allegations in his complaint, in an action to determine an adverse claim, relating to such defects are immaterial.—Lehman v. Sutter, 97.

Same—When Land not Subject to Location.

3. Mining ground covered by valid and subsisting locations is not public domain and therefore not open to exploration and purchase under the federal statute.—Lehman v. Sutter, 97.

Same—Location Within Subsisting Claim Void.

4. An attempted location of a mining claim, based upon a discovery within a then valid and subsisting claim, is void for the purpose of laying the foundation for an adverse claim, and does not attach upon the subsequent failure of the first locator to do the required annual assessment work.—Lehman v. Sutter, 97.

Same—Failure to Do Assessment Work—Effect.

5. A location of a mining claim upon ground covered by a valid and subsisting claim, at a time when the senior locator is not in default under state or federal laws, is subordinate to a relocation by a stranger made after the rights of the first locator lapsed because of failure to do the annual assessment work.—Lehman v. Sutter, 97.

Same—Relocation by Owner—When Valid.

6. Under section 2289, Revised Codes, the locator or claimant may at any time relocate his own claim for any purpose other than to avoid the doing of the annual assessment work, provided he complies in all respects with the requirements of sections 2283, 2284 and 2286, Revised Codes.—Lehman v. Sutter, 97.

Same—Abandonment—Rights of Nonconsenting Cotenant.

7. Where three or four cotenants of mining claims abandoned them by relocating other claims covering the same ground, the rights of the fourth remained unaffected by their abandonment and, therefore, as to the latter the claims thus abandoned remained valid and subsisting claims until forfeited.—Lehman v. Sutter, 97.

Same—Assessment Work—Preserves Claimant's Right, Until When.

8. Representation work done on a mining claim during any one year is sufficient to preserve the claimant's right until the 31st of December of the next year.—Lehman v. Sutter, 97.

Same—Relocation by Owner—When Ineffectual.

9. Where relocators of their own claims did not do the excavation work required to be done, under section 2289, Revised Codes, before another had located the same ground, their attempted relocations were nugatory.—Lehman v. Sutter, 97.

ıts.

ining claims and mill sites conveyed a certain laintiff's predecessor, reserving in itself the lum- a flume connecting with a quartz-mill on the o a right of way for a road thereto, the right ilings on the portion conveyed, *etc.* The re- erty was sold to defendant's predecessor in in- laintiff acquired title with full knowledge of that water conveyed through the flume was the mill, and that therefore, while the deed did the right to so convey the water, he took title with an implied easement in defendant to use —Pioneer Mining Co. v. Bannack Gold Mining

conduct water to a quartz-mill necessarily implies it from the mill.—Pioneer Mining Co. v. Ban- ., 254.

Use of Water.

42, Revised Codes, the location of a flume main- of another, as well as the use of the water may be changed, provided the change adds no

new burdens to the servient estate or causes additional damage thereto.—Pioneer Mining Co. v. Bannack Gold Mining Co., 254.

Ejectment—Right to Nominal Damages—Insufficient to Warrant Reversal of Judgment.

13. Where, in an action in ejectment, the property involved consisting of mining claims, the only meritorious claim for damages was based upon an encroachment of plaintiff's land by the erection of a toilet erected for temporary use, the injury complained of was too small to be a basis for the computation of damages, unless merely nominal, and therefore insufficient to warrant reversal of the judgment otherwise proper.—Pioneer Mining Co. v. Bannack Gold Mining Co., 254.

MINORS.

See Infants.

MINUTES.

Of district court—What does not constitute correction,—see Verdicts, 3.

New trial—On minutes of court—Presumptions,—see New Trial, 6, 9.

MISDEMEANORS.

Prior conviction—Impeachment of witness—Improper cross-examination,—see Criminal Law, 66.

MORTGAGES.

See, also, Contracts, 15; Conversion, 1–4; Promissory Notes, 1–4.

Chattel Mortgages—Conditional Sale Contracts—Recordation—Assignment—Rights of Assignee of *Bona Fide* Mortgagee.

1. Where a chattel mortgage, executed by the purchaser of the property under a conditional sale contract, was filed for record prior to the recordation of the contract, it was as valid in the hands of the assignee of the mortgage as it was in those of the *bona fide* mortgagee for value and without notice, even though the assignee may have had actual notice of the existence of the conditional contract of sale at the time of the assignment.—Hoeller v. Moog, 74.

Same—Conditional Sales—Right of Purchaser to Mortgage Property.

2. The purchaser of personal property under a conditional sale contract whereby title was reserved in the seller until full payment made had a mortgageable interest in it (section 5757, Rev. Codes, as amended, Laws 1913, Chap. 86).—Hoeller v. Moog, 74.

MOTIONS.

Nature, How Determined.

1. As the nature of an action must be determined by the pleadings, regardless of the designation given it by the parties, so an order granting a motion must be judged by its effect rather than by its wording.—Currey v. Butte Electric Ry. Co., 146; State v. Stein, 441.

MOTIVE.

Evidence,—see Criminal Law, 28, 41.

MURDER.

See Criminal Law, 11–20, 60–65, 78–87.

NEGLIGENCE.

See, also, Personal Injuries.

Destruction of grain stacks by sparks from threshing machine—Proximate cause—Complaint—Insufficiency,—see Pleading and Practice, 29, 30.

Of driver of automobile—Railroad crossing accident,—see Railroads, 9, 10.

Ordinary care to provide and maintain machinery in condition—Erroneous instruction,—see Instructions, 10.

NEGOTIABLE INSTRUMENTS.

See Promissory Notes.

NEWSPAPERS.

Motion for change of venue based on newspaper articles,—see Criminal Law, 79.

NEW TRIAL.

See, also, Criminal Law.

Inadequacy of damages—When new trial will not be ordered,—see Personal Injuries, 24.

Power of supreme court to award adequate damages without awarding new trial,—see Personal Injuries, 23.

Quotient verdict,—see Personal Injuries, 3.

Insufficiency of Evidence—Refusal, When Error.

1. The advantageous position occupied by the jury and the lower court in weighing the testimony of witnesses who appear before them in a personal injury action does not prevent a reversal of the order denying a new trial on the ground of insufficiency of the evidence, where the testimony supporting the verdict is highly improbable or incredible or is inherently impossible in view of the physical facts.—Casey v. Northern Pacific Ry. Co., 56.

Discretion—Appeal and Error.

2. It is only for manifest abuse of discretion on the part of the trial court in granting or refusing a new trial that its action will be reversed on appeal.—Stettheimer v. City of Butte, 111.

Motion Lies, When.

3. A motion for a new trial lies where an issue of fact was wrongfully or erroneously determined by the jury or by direction of the court.—Buckhouse v. Parsons, 156.

Directed Verdict—Motion by Both Parties.

4. Where both parties moved for a directed verdict, thus in effect submitting the cause upon an agreed statement of facts, the court may nevertheless grant the defeated party a new trial if it deems the verdict as directed by it erroneous.—Buckhouse v. Parsons, 156.

When Proper.

5. A motion for new trial because of insufficiency of evidence to justify the verdict moves the discretionary powers of the court, while one based on alleged error of law, occurring at the trial and excepted to by the defendant, presents a question of strict legal right, but in either case the granting of the motion, if sustained by the record, is proper.—Buckhouse v. Parsons, 156.

On Minutes of Court—Presumptions.

6. Where the notice of intention to move for a new trial was based upon the minutes of the court and a bill of exceptions thereafter to be settled, and the record on appeal from the order granting a new trial was silent as to the existence of a bill of exceptions, the supreme court will presume that the order was made upon the minutes, the burden of showing that it was not so made having been upon respondent.—Price v. Northern Pacific Ry. Co., 166.

Grounds—Notice of Intention Controlling.

7. Since the party moving for a new trial may be heard only upon the grounds urged in his notice of intention, where movant in his notice to the adverse party stated that he would call his motion for hearing on a certain day and that the motion would be made pursuant to the notice of intention "and upon the records and files in said action," he neither added to nor detracted from the grounds of the motion itself by the words quoted.—Price v. Northern Pacific Ry. Co., 166.

Diligence in Bringing Motion to Hearing—Discretion.

8. The question whether diligence was or was not shown in presenting a new trial motion for hearing is addressed to the discretionary power of the trial court, reviewable only in case of abuse of its discretion.—Price v. Northern Pacific Ry. Co., 166.

Hearing—Diligence—Presumptions.

9. In the absence of an affirmative showing that the trial court abused its discretion in hearing a motion for new trial eleven months after notice of the motion, it will be presumed on appeal that it was heard at the earliest practicable period after notice, as required by section 6797, Revised Codes, where the motion was based upon the minutes of the court.—Price v. Northern Pacific Ry. Co., 166.

Hearing—Diligence—Duty of Parties.

10. While primarily the duty of calling a motion for new trial for hearing at the earliest practicable period after notice of motion devolves upon movant, the adverse party may do so if he feels aggrieved by delay, and where he does not, he is not in position to complain.—Price v. Northern Pacific Ry. Co., 166.

What is not "Newly Discovered Evidence."

11. An affidavit in support of a motion for a new trial following a conviction for attempted rape that the prosecuting witness, some five months before the trial, said to affiant that, if defendant didn't "fork over," she "would send him over the road for the rest of his life," was not "newly discovered evidence" within the meaning of section 9350, Revised Codes, that expression meaning evidence discovered since the trial.—State v. Prouty, 310.

Newly Discovered Evidence—Affidavit of Defendant Required.

12. Failure of defendant to show by his own affidavit that alleged newly discovered evidence was not known to him at the time of the trial warrants refusal to grant a retrial, affidavits of others in that regard being, as a general rule, insufficient.—State v. Prouty, 310.

Same—Affidavits—Insufficiency.

13. Affidavits in support of a motion for new trial on the ground of newly discovered evidence will not be considered, where it is not shown that the matters therein contained were not discovered and known by defendant before the conclusion of the trial.—State v. Bennett, 355.

Same—When not to be Granted.

14. A new trial asked for on the ground of newly discovered evidence, based on a stipulation of counsel that after trial and sentence events occurred which showed that defendant did not profit from his crime, but that others obtained the money from the place where it was hidden by defendant, cannot be granted by the supreme court for the purpose of enabling him to obtain a lighter sentence than the court imposed in the absence of such knowledge.—State v. Stevens, 390.

Same—Cumulative evidence—Impeachment of witness.

15. Where alleged newly discovered evidence is merely cumulative and designed to impeach the credibility of a witness further than it had already been impeached, a new trial cannot be granted.—State v. Stein, 441.

Motion Based on Documentary Evidence—Review on Appeal.

16. As a rule the supreme court is more reluctant to set aside an order granting than one refusing a new trial, but where the motion was based entirely upon documentary evidence, it is in as advantageous a position to pass upon its merits as was the trial court, and will set aside the order if from the record it is unable to ascertain upon what theory the motion could have been granted.—State v. Stein, 441.

NONSUIT.

When proper in personal injury action,—see Personal Injuries, 15.

NOTICE.

Of disability,—see Insurance, 2, 3.

Of order overruling demurrer—Service by mail,—see Pleading and Practice, 11–14.

NUISANCES.

Cities and Towns—Septic Tanks—Improper Operation—Complaint—Sufficiency.

1. In an action to abate a nuisance and to recover damages, the complaint, which in substance alleged that by the negligent operation of a septic tank in connection with defendant city's sewer system near his premises, in dumping the excrement therefrom upon a gravel-bar, polluting the atmosphere as well as the water used by plaintiff for domestic and business purposes, to such an extent as to render his dwelling-house unfit for habitation, *etc.*, *held* to state a cause of action.—Newton v. City of Roundup, 24.

Evidence—Sufficiency.

2. Evidence showing that the air over the portion of plaintiff's premises on which his dwelling-house and other improvements were situation was polluted by noxious odors emanating from the material removed from the septic tank and deposited about 150 yards from his premises was sufficient to show negligent operation of the tank and the existence of a nuisance.—Newton v. City of Roundup, 24.

Excessive Verdict.

3. A verdict for $2,000 in an action for damages for maintaining a nuisance, where it appeared that besides losing $15 rental a month of a house and garden for about a year, plaintiff lost the use of a quarter-section of land with improvements thereon, and suffered discomfort and annoyance for practically two years, *held* not excessive, it being impossible in such a case to lay down a fixed measure of damages.—Newton v. City of Roundup, 24.

ORDER OF PROOF.

Discretion,—see Evidence, 11.

ORDINANCES.

Violation of penal ordinances—Appeal by city does not lie,—see Cities and Towns, 6.

Violation of penal ordinance—Personal injuries—Parties *in pari delicto*,—see Personal Injuries, 2.

OUSTER.

See Real Property, 4.

PARTIES.

In pari delicto,—see Personal Injuries, 2.

Joinder of heirs as parties plaintiff, in action by administrator for death of intestate, not misjoinder,—see Personal Injuries, 17.

PARTITION FENCES.

See Fences.

PARTNERSHIP.

Dissolution by Death—Survivor must Make Accounting to Executrix of Decedent.

1. Where the affairs of a general partnership dissolved by death were not fully settled, an action for an accounting by the surviving partner for his sole benefit, against the executrix of the decedent did not lie, in view of the provisions of section 7607, Revised Codes, which *inter alia* make it the duty of the survivor who, in contemplation of law, is in actual possession of the partnership property, to wind up its affairs, and thereupon account to the personal representative of the decedent.—Mares v. Mares, Executrix, 36.

Dissolution—Continued Existence for Purpose of Settlement of Affairs.

2. Until the affairs of a partnership, dissolved by death or any other cause, are closed, it has a limited existence for the purpose of collecting its assets, settling all accounts and making good its outstanding engagements.—Mares v. Mares, Executrix, 36.

Dissolution by Death—Claims of Surviving Partner—Presentation for Allowance Necessary.

3. Where a partnership is dissolved by death, and upon liquidation of its affairs, or in course thereof, it appears that the deceased partner was indebted to the survivor in an amount over and above the partnership assets, the latter was required to present his claim for allowance under the provisions of section 7525, Revised Codes.—Mares v. Mares, Executrix, 36.

PATENTS.

To land abutting on river does not include islands,—see Real Property, 12.

PERSONAL INJURIES.

Parties *in Pari Delicto*—Violation of Statute or Ordinance—Negligence *Per Se*—Exception to Rule.

1. The rule that the violation of a penal statute or ordinance by one resulting in injury to another is negligence *per se* does not

apply where the wrongdoer and the injured party are *in pari delicto*.—Jackson v. Lomas, 8.

Explosives—Violation of Penal Ordinance—Parties *in Pari Delicto*—Effect.

2. A city ordinance prohibited the sale, as well as the discharge, of fireworks, *etc.*, within the city limits. A minor purchased a package of firecrackers from defendant, discharged one and was injured. *Held*, that having been *in pari delicto* with defendant in violating the ordinance, he could not recover damages for the injuries sustained.—Jackson v. Lomas, 8.

Master and Servant—Quotient Verdict—New Trial.

3. Where the jurors in a personal injury action agreed among themselves that in arriving at a verdict each of them should write the amount he deemed plaintiff entitled to upon a slip of paper, the several amounts to be added by one of their number, acting as clerk, and the sum total divided by twelve, the amount thus arrived at to stand as their verdict, the result was a quotient verdict entitling defendant to a new trial.—Zanos v. Great Northern Ry. Co., 17.

"Negligence"—Definition.

4. Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such person under the existing circumstances would not have done.—Zanos v. Great Northern Ry. Co., 17.

Impairment of Earning Capacity—Faulty Instruction.

5. An instruction that if the evidence made it appear that plaintiff's earning capacity had been impaired by reason of his injuries, the jury should compensate him for such impairment, without stating a rule or guide for arriving at the amount to be awarded in that behalf, was faulty.—Zanos v. Great Northern Ry. Co., 17.

Evidence—Admissibility Under Pleadings.

6. Under the allegation of the complaint, after more minutely describing plaintiff's injuries, that his body had been "otherwise injured," evidence that he had sustained a rupture was admissible, over the objection that such injury was not within the pleadings.—Zanos v. Great Northern Ry. Co., 17.

Railroads—Master and Servant—Evidence—Insufficiency.

7. In an action for injuries sustained by a locomotive engineer who jumped from his engine just before it collided with a train ahead of him, plaintiff's testimony, which contradicted itself as to essential details, which was contradicted by his own witness and by the harmonious testimony of the other employees offered by defendant, and much of which was inherently improbable, *held* insufficient to sustain a verdict in his favor.—Casey v. Northern Pacific Ry. Co., 56.

Same—Appeal and Error—Conflict in Evidence—When Verdict not Conclusive.

8. The rule that a verdict returned upon conflicting evidence and approved by the trial court by its order denying a new trial, will not be disturbed on appeal if there is some substantial evidence to support it, has reference to real conflicts arising between testimony introduced by plaintiff and that given by opposing witnesses, and not to conflicting statements made by himself or those of his witnesses.—Casey v. Northern Pacific Ry. Co., 56.

Same—New Trial—Insufficiency of Evidence—Refusal, When Error.

9. The advantageous position occupied by the jury and the lower court in weighing the testimony of witnesses who appear before them in a personal injury action does not prevent a reversal of the order denying a new trial on the ground of insufficiency of the evidence, where the testimony supporting the verdict is highly improbable or incredible or is inherently impossible in view of the physical facts.—Casey v. Northern Pacific Ry. Co., 56.

Same—When Physical Facts Controlling Over Testimony.

10. Where physical conditions surrounding an accident point so unerringly to the truth as to leave no room for a contrary conclusion based on reason or common sense, the mere fact that testimony is introduced in conflict with them is not sufficient to make a case for the jury.—Casey v. Northern Pacific Ry. Co., 56.

Same—When Court may Disregard Unimpeached Testimony.

11. A court may reject the most positive testimony of a witness though not discredited by direct evidence impeaching him or contradicting his statements, where his story is inherently improbable, creditable swearing only concluding its judgment.—Casey v. Northern Pacific Ry. Co., 56.

Same—Appeal and Error—Verdict—Sufficiency of Evidence—Self-contradictory Statements of Plaintiff—How Viewed on Appeal.

12. In determining whether plaintiff's testimony is sufficient to support a verdict in his favor, his case may be judged by that portion of his self-contradictory testimony which is least favorable to him.—Casey v. Northern Pacific Ry. Co., 56.

Same—New Trial—Refusal—When Abuse of Discretion.

13. Where plaintiff in a personal injury action wholly failed to make out a case, and the testimony of defendant's witnesses did not supply the defects, the court abused its discretion in denying a motion for new trial.—Casey v. Northern Pacific Ry. Co., 56.

Same — Evidence — Estimates of Distances — Exact Measurements Controlling.

14. Under the rule that proof of actual measurements is so far superior to an estimate of distances that no issue for the jury is raised by a conflict between the two, measurements made by a civil engineer between points on a railway track an exact determination of which was vital in the trial of an action by a locomotive engineer who was injured by a collision were controlling over mere estimates made by plaintiff who by his testimony had demonstrated that he was without capacity for judging distances or colored his statements to meet the exigencies of his case.—Casey v. Northern Pacific Ry. Co., 56.

Same—Master and Servant—Nonsuit—When Proper.

15. In an action by a railroad section-hand to recover for injuries caused by a tie falling upon him from a car which he, with others, was unloading, a nonsuit was properly granted, his evidence not disclosing negligence on the part of anyone to which the fall of the tie and the consequent injuries could be said to have been attributable. (MR. JUSTICE COOPER dissenting.)—Hassan v. Northern Pacific Ry. Co., 105.

Same—Negligence—Burden of Proof.

16. In a personal injury action by an employee against his employer, whether based upon the Employers' Liability Act (Chap. 29, Laws 1911) or not, plaintiff has the burden of proving negligence.—Hassan v. Northern Pacific Ry. Co., 105.

INTOXICATING LIQUORS.

Sale,—see Criminal Law, 66–77.

Search-warrants—Improper Issuance.

1. Search-warrant *held* improperly issued, under decision in the case of *State ex rel. Samlin* v. *District Court*, 59 Mont. 600.—State ex rel. Hogue v. O'Brien, 178.

INTOXICATION.

Evidence—Admissibility,—see Personal Injuries, 20.

ISLANDS.

Patent to land abutting on river does not include,—see Real Property, 12.

JAILS.

Sheriffs entitled to compensation received by counties for subsistence of federal prisoners,—see Counties, 2–5.

JUDGMENTS.

Right to nominal damages insufficient to warrant reversal of judgment,—see Damages, 6.

On Pleadings—When Improper.

1. Where an issue of fact is raised by the allegations of the complaint by denials controverting them, a judgment on the pleadings is improper.—Aiken v. City of Glendive, 1.

Dismissal of Action—Default—Neglect to Demand Entry of Judgment.

2. The six months period at the expiration of which an action may be dismissed by the court, under section 6714, Revised Codes, if the party entitled to judgment neglects to demand and have the same entered, does not commence to run from date of entry of default, in a personal injury action, but from the date of final submission, *i. e.*, production of proof by plaintiff.—Batchoff v. Butte Pacific Copper Co., 179.

Default Judgment—Premature Entry—Error Within Jurisdiction.

3. Premature entry of default constitutes error within jurisdiction, the judgment following being voidable, not void.—Batchoff v. Butte Pacific Copper Co., 179.

Same—Refusal to Vacate—Appealable Order.

4. An order, made after judgment, denying a motion to set aside a default and judgment, is appealable under section 7098, Revised Codes; hence where no appeal was taken, the alleged error in refusing the motion was not reviewable on appeal from the judgment. (On rehearing.)—Batchoff v. Butte Pacific Copper Co., 179.

Appeal from Judgment—Record on Appeal—Bills of Exception.

5. *Held*, that the provision of section 7112, Revised Codes, requiring that the record on appeal from a final judgment shall contain the judgment and any bills of exception upon which appellant relies, refers to only such bills of exceptions as are settled under sections 6787 and 6788 or are used on motion for new trial, and that therefore any bill not so settled or used cannot be considered on such appeal. (On rehearing.)—Batchoff v. Butte Pacific Copper Co., 179.

Federal Courts—*Res Adjudicata*—Claims Against Estate—Payment.

6. Plaintiff brought action in the United States district court to recover interest due from an estate on money belonging to plaintiff

and used by decedent in his lifetime while acting as plaintiff's guardian. Defendant interposed the defenses of the statute of limitations, laches and noncompliance with the statute of nonclaim. Judgment for plaintiff was affirmed on appeal to the circuit court of appeals. Basing his claim upon the judgment thus obtained, plaintiff made demand upon the executrix for payment. The executrix submitted her final report to the state district court and petitioned for distribution of the estate and payment of outstanding claims, stating that the claim of plaintiff had not been paid. A beneficiary of decedent filed objections to payment of plaintiff's claim on grounds the same as those urged in the federal court. A trial was had in the district court sitting in probate, evidence heard and judgment rendered for plaintiff. *Held*, that the questions raised by the objections were foreclosed by the judgment of the federal court, that the judgment of that court was conclusive under the doctrine of *res adjudicata*, and that the action of the trial court in again trying the same question determined by the federal court was error.—In re Smith's Estate, 276.

Same—State Court's Refusal to Give Effect to Judgment of Federal Court—Federal Question.

7. Where a state court refuses to give effect to a judgment of the federal court upon a point in dispute, and within its jurisdiction, a federal question arises under the laws of the United States establishing the circuit court and vesting it with jurisdiction.—In re Smith's Estate, 276.

Against Executors and Administrators—Establishment of Claim Against Estate.

8. A judgment against an executor or administrator upon a claim against the estate establishes the claim to be paid in due course of administration.—In re Smith's Estate, 276.

Against Executors and Administrators—Binding upon Whom.

9. A judgment against the executor or administrator of an estate is in effect a judgment against the estate, and all persons interested in the estate, whether they be heirs, legatees or creditors, as privies are foreclosed by it on the merits of the claim.—In re Smith's Estate, 276.

Same—Who are Privies.

10. Privies are those who are so connected with the parties in estate, or blood or in law, as to be identified with them in interest, and consequently to be affected with them by the litigation, such as heir and ancestor, executor and testator, *etc.*—In re Smith's Estate, 276.

What Deemed Adjudicated.

11. A right, question or fact, distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies.—In re Smith's Estate, 276.

Decisions of Appellate Courts—Conclusiveness.

12. The judgments of appellate courts are as conclusive as those of any other courts, and they not only establish facts, but also settle the law, so that the law as decided upon any appeal must be applied in all the subsequent stages of the cause.—In re Smith's Estate, 276.

Conclusiveness of Federal Judgment.

13. The judgment or decree of a federal court is binding and perfect between the parties until reversed, without regard to any adverse opinion or judgment of any other court of merely concurrent jurisdiction, and its integrity, validity and effect are complete in all re-

Oral Contracts—Work and Labor—Complaint—Insufficiency.

2. The complaint in an action to recover compensation for extra services performed, which fails to state any time or basis for computing the claim, is indefinite.—Donovan v. Bull Mountain Trading Co., 87.

Mines and Mining Claims—Adverse Claim—Complaint.

3. In an action to determine an adverse claim to a lode mining claim, the complaint is sufficient if plaintiff by appropriate allegations shows his right to the ground covered by his location, without alleging the nature of defendant's claim, the duty of doing so devolving upon defendant.—Lehman v. Sutter, 97.

Same—Complaint—Location—Defect in Recorded Certificate—Immaterial Allegation.

4. In view of the provision of section 2293, Revised Codes, that defects in a recorded certificate of location of a mining claim shall not be deemed material where the person relying on the defects made his location with notice thereof, allegations in his complaint, in an action to determine an adverse claim, relating to such defects are immaterial.—Lehman v. Sutter, 97.

Actions—Motions—Nature, How Determined.

5. As the nature of an action must be determined by the pleadings, regardless of the designation given it by the parties, so an order granting a motion must be judged by its effect rather than by its wording.—Currey v. Butte Electric Ry. Co., 146.

Contracts—Loss of Business and Profits—Special Damage—Complaint.

6. Damages for loss of business and profits resulting from a breach of contract are special in character, in the sense that, while flowing from the action of the defendant, they are not such a necessary result thereof as that they will be implied by law, and must be pleaded.—Whitelaw v. Vallance, 172; Humber v. Marshall, 267.

Same—Complaint—Nominal Damages.

7. Under a complaint alleging that plaintiff had purchased potatoes from defendants at a stated price and offered to receive and pay for them on a certain date, out that defendants failed to make delivery, plaintiff was entitled to no more than nominal damages.—Whitelaw v. Vallance, 172.

Same—Time of Performance—Complaint—Insufficiency.

8. Where the contract of purchase of potatoes for the breach of which damages were sought was silent as to the time of their delivery, and the complaint did not allege any date or that delivery should be made within a reasonable time, the pleading was insufficient.—Whitelaw v. Vallance, 172.

Personal Injuries—Death—Master and Servant—Action by Administrator—Complaint—Sufficiency—Misjoinder of Parties.

9. The right of action for damages given by section 6486, Revised Codes, to the heirs or personal representative of an adult whose death is caused by wrongful act or negligence is solely for the benefit of the heirs, the representative merely acting as their trustee and the amount recovered not being a part of decedent's estate; hence the complaint of an administrator setting forth the damages sustained by decedent's father and mother was not open to demurrer on the ground of misjoinder of parties plaintiff (the administrator and the heirs) or causes of action, recovery by the administrator barring a subsequent action by the heirs.—Batchoff, Admr., v. Butte Pacific Copper Co., 179.

Same—Heirs—Complaint—Sufficiency—Inferences.

10. Since under section 4820, subdivision 2, Revised Codes, the father and mother of an intestate were his heirs at law, the allegation of plaintiff administrator that the adult for whose wrongful death damages were sought died intestate, leaving surviving him his father and mother, naming them, was sufficient to state by inference that they were his heirs, in the absence of a direct allegation to that effect.—Batchoff, Admr., v. Butte Pacific Copper Co., 179.

Overruling Demurrer—Service of Notice by Mail.

11. *Quaere:* Was service of notice of the overruling of a demurrer, time being given within which to answer, made by mailing a postal card, legal service?—Batchoff, Admr., v. Butte Pacific Copper Co., 179.

Same—When Service of Notice by Mail Complete.

12. Service of notice by mail of overruling of demurrer was complete upon deposit thereof in the postoffice, even though the notice was never received by the party to whom it was addressed.—Batchoff, Admr., v. Butte Pacific Copper Co., 179.

Same—Extension of Time for Answer—Distance Between Places of Deposit and Address—Judicial Notice.

13. In determining whether the time for answering, after demurrer overruled was extended one day for every twenty-five miles distance between the place of deposit of notice, served by mail, and place of address, courts may take judicial notice of the distance between the place where mailed and the place of address.—Batchoff, Admr., v. Butte Pacific Copper Co., 179.

Same—Extension of Time for Answer—Applicability of Statute.

14. The provision of section 7148, Revised Codes, that in case of service by mail, where something is to be done by the adverse party within a given number of days after service, the time within which it may be done is extended one day for every twenty-five miles distance between the place of deposit and the place of address, applies in a case where, after overruling of a demurrer to a complaint defendant is granted a given number of days within which to serve and file answer, or is ordered to do so on or before a certain date, the two meaning substantially the same thing.—Batchoff, Admr., v. Butte Pacific Copper Co., 179.

Railroads—Unreasonable Rates—Railroad Commission Act—Remedies Exclusive—Complaint—Insufficiency.

15. *Held,* that the remedies prescribed by Chapter 37, Laws of 1907 (Rev. Codes, secs. 4363–4399), for recovery of damages caused by the exaction of discriminatory or unreasonable freight charges, are exclusive, and that therefore a complaint based upon the common-law remedy and drawn in entire disregard of the provisions of the statute did not state a cause of action, the common-law remedies having been superseded by said chapter.—Doney v. Northern Pacific Ry. Co., 209.

Same—Complaint—Jurisdictional Allegation.

16. Under section 4389, Revised Codes, an allegation that payment of alleged discriminatory or unreasonable freight charges was made in the county in which the action is brought is jurisdictional.—Doney v. Northern Pacific Ry. Co., 209.

Same—Presumptions—Complaint—Insufficiency.

17. Since the presumption obtains that the railroad commission fixed and established reasonable rates in obedience to section 4375, Revised Codes, and that the rate as established is in accordance with the

approved and published tariff, a complaint which fails to allege that freight charges were not in accordance with such tariff is defective. Doney v. Northern Pacific Ry. Co., 209.

Same—Unjust Rates—Remedies—Procedure.

18. A shipper deeming himself aggrieved by a rate fixed by the railroad commission because unjust, unreasonable or discriminatory, must proceed under section 4391, Revised Codes, if he desires to have it declared so; where no rate has been fixed or the one established is considered excessive, he must apply to the commission for investigation and determination of his contention, under section 4377, before he can maintain an action in the courts; and if his case is predicated upon freight charges made in excess of those fixed and established by the commission, his complaint must so allege and the action must be brought within twelve months from the date of payment, under section 4389.—Doney v. Northern Pacific Ry. Co., 209.

Contracts—Right of Action by Third Party—Complaint.

19. To entitle a third person to enforce a contract made between two others, under section 4970, Revised Codes, the complaint must show that it was expressly made for his benefit, or for the benefit of a class of persons to which he belongs, *i. e.*, he, or they, either must be named therein or otherwise sufficiently described or designated; the fact that the contract may incidently benefit him or them, being insufficient.—McKeever v. Oregon Mortgage Co., Ltd., 270.

Receivers—Insolvency of Defendant—Insufficient Showing.

20. Where, in an action to set aside an oil lease as fraudulent, the complaint and affidavit of plaintiffs upon which a receiver was appointed without notice, did not affirmatively show that defendants were insolvent, the appointment was unwarranted.—Martin v. Hover, 302.

Same—Complaint and Affidavit—Verification.

21. A receiver may be appointed upon the complaint if verified upon positive knowledge, or upon the complaint and a proper affidavit so verified.—Martin v. Hover, 302.

Same—Complaint—Verification by Mentally Incompetent—When Insufficient.

22. Where the complaint in an action to set aside an oil lease on the ground of fraud alleged, *inter alia*, that the lessor was not only ignorant and without experience in business, but so far incompetent as to be incapable of understanding ordinary legal instruments and ever ready to follow any suggestions made or advice given him by one in whom he had confidence, his verification attached to the complaint had no evidentiary value, and was therefore insufficient as a foundation for the appointment of a receiver without notice.—Martin v. Hover, 302.

Pleadings—Complaint—Amendment to Conform to Proof—When Rule not Applicable.

23. The rule that the complaint may be deemed amended after trial to conform to the proof cannot be invoked where the amendment involves a change in the issues of the case and does not conform to the theory upon which it was tried.—United States Nat. Bank v. Great Western Sugar Co., 342.

Trial on Agreed Statement—Waiver of Defects—Variance—Appeal.

24. Where a cause is tried on an agreed statement of facts which purports to contain all of the evidence, the pleadings become immaterial except in so far as admissions therein contained are concerned, the trial court must render judgment on the merits of the case as

disclosed by such statement, and the supreme court on appeal will affirm the judgment where under the facts as agreed plaintiff was entitled to prevail even though there was a fatal variance between the pleadings and the proof.—United States Nat. Bank v. Great Western Sugar Co., 342.

Pleadings—Motions—Nature of—How to be Determined.

25. In determining the character of pleadings, motions and other papers filed in an action, the object sought to be attained is controlling.—State v. Stein, 441.

Personal Injuries—Complaint—Insufficiency.

26. Complaint, in an action by a railway employee for injuries caused by the breaking of a lever used in the operation of semaphores, which, while averring that for a long time the lever had been cracked, defective and dangerous, that defendant negligently and carelessly permitted it to remain in such condition for a long period of time, and knew of such condition of the lever, or by the exercise of reasonable care and caution should have known thereof, *etc.*, failed to specify the time during which defendant had knowledge, or opportunity to know, of the defect in the lever, *held* fatally defective.—Boyle v. Chicago, Mil. & St. P. Ry. Co., 453.

Same—Complaint—Sufficiency—How Tested—Exception Saved for All Purposes.

27. The sufficiency of the complaint may be tested by demurrer and objection to the introduction of any evidence under it, and exceptions once saved to adverse rulings thereon are saved for all purposes.—Boyle v. Chicago, Mil. & St. P. Ry. Co., 453.

Same—Complaint—Insufficiency—Amendment—Proper Denial.

28. Where the attention of plaintiff in a personal injury action had been called to a fatal defect in her complaint by general demurrer, which was overruled, and by objection, at the commencement of the trial, to the introduction of any testimony on the ground of the insufficiency of the pleading to state a cause of action, also overruled, thus affording her ample opportunity to correct the defect, refusal to permit amendment at the close of all the testimony and after defendant had moved for a directed verdict on the same ground among others, was not an abuse of discretion.—Boyle v. Chicago, Mil. & St. P. Ry. Co., 453.

Negligence—Proximate Cause of Injury—Complaint must Allege—Exception to Rule.

29. Since negligence does not give rise to a cause of action unless it was the proximate cause of injury, the complaint must disclose the causal connection between the acts of negligence alleged and the injury suffered, unless such connection is necessarily inferred from the facts stated, in which event a specific allegation to that effect may be dispensed with.—O'Neil v. Christian, 460.

Same—Causal Connection Between Negligence and Injury—Complaint—Insufficiency.

30. Complaint in an action to recover damages for grain burned in the stack due to alleged negligence in the person doing the threshing, *held* insufficient to show a causal connection between the negligence and the burning; *held*, further, that the contention that from the allegations that the threshing-engine had been placed to the windward of the stacks of grain, that the smokestack thereon was old and worn, that, if a spark-arrester was used, it was in the same condition and full of holes, that coal of inferior quality was used

by defendant, that the engine was in charge of an unlicensed and incompetent engineer, *etc.*, it was a necessary inference that fire was emitted from the engine and communicated to the grain stacks, and that for that reason a direct allegation as to causal connection was not required, under the above rule, is untenable.—O'Neil v. Christian, 460.

Promissory Notes—Pleading—Inconsistent Defenses—Election of Remedies.

31. Where, in an action on a promissory note and to foreclose a mortgage, defendants denied generally the making and delivery of the instruments, and in two special defenses alleged affirmatively that they were in fact executed and delivered to plaintiff, and in a third pleaded fraud, the pleading was so incongruous as to require them to elect upon which defense they intended to rely, under the rule that while inconsistent defenses may be pleaded, they must not be so incompatible with each other that if one be true, the other must of necessity be false.—International Harvester Co. v. Merry, 498.

Same—Inconsistent Defenses—Waiver of All Defenses Pleaded, When.

32. *Held*, under the condition of the answer set forth in paragraph 34 above, that the statements of defendants' counsel that they would waive all special defenses except that of fraud, and, upon an adverse ruling upon the sufficiency of the latter defense, that they would rest, amounted to a waiver and abandonment of all the other defenses pleaded.—International Harvester Co. v. Merry, 498.

Same—Compromise and Settlement—Answer—Readiness and Ability to Perform.

33. Where settlement and compromise are alleged in answer to a complaint on a promissory note, whereby plaintiff harvester company was to take back a plowing outfit, defendants to pay plaintiff a certain sum, it was incumbent upon defendants to plead their readiness and ability to perform their part of the undertaking.—International Harvester Co. v. Merry, 498.

PLEDGES.

Of corporate stock—Sale without opportunity to redeem—Redemption, when proper,—see Corporations, 2.

POLICE COURTS.

Appeal from, by city, does not lie,—see Justice Courts, 1.

PRESCRIPTION.

See Cities and Towns, 4, 5.

PRESUMPTIONS.

Of due care—Personal injuries,—see Instructions, 7.

Of exercise of wise discretion in awarding custody of minors to divorced parent,—see Husband and Wife, 9.

New Trial—On Minutes of Court.

1. Where the notice of intention to move for a new trial was based upon the minutes of the court and a bill of exceptions thereafter to be settled, and the record on appeal from the order granting a new trial was silent as to the existence of a bill of exceptions, the supreme court will presume that the order was made upon the minutes,

the burden of showing that it was not so made having been upon respondent.—Price v. Northern Pac. Ry. Co., 166.

Same—Hearing—Diligence.

2. In the absence of an affirmative showing that the trial court abused its discretion in hearing a motion for new trial eleven months after notice of the motion, it will be presumed on appeal that it was heard at the earliest practicable period after notice, as required by section 6797, Revised Codes, where the motion was based upon the minutes of the court.—Price v. Northern Pac. Ry. Co., 166.

Freight Rates Fixed by Railroad Commission.

3. The rates established by the railroad commission are presumed to be reasonable until the contrary is made apparent.—Doney v. Northern Pac. Ry. Co., 209.

Real Property—Conveyances Between Husband and Wife—Gifts.

4. The rule declared by section 4538, Revised Codes, that where real property is conveyed to one person and the consideration therefor is paid by another, a trust is presumed to result in favor of the person paying the consideration, *held*, subject to the exception that where the property is purchased by one with his own money and the title is placed by him in another to whom he stands in a confidential relation, such as husband, wife, parent, child, *etc.*, the presumption, rebuttable in character, is that the conveyance is made as a gift.—Clary v. Fleming, 246.

Easements.

5. As respects easements, the parties to a contract to sale of land are presumed to have contracted with reference to the conditions of the property at the time of sale, provided the marks are open and visible.—Pioneer Mining Co. v. Bannack Gold Min. Co., 254.

Appeal—Prejudice.

6. Prejudice cannot be assumed on appeal must be made to appear affirmatively.—State v. Prouty, 310.

PRIOR CONVICTION.

Evidence on issue of insanity showing escape from prison though prior conviction not charged, not prejudicial,—see Criminal Law, 62.

Of witness for misdemeanor—Impeachment—Improper cross-examination,—see Criminal Law, 66.

PRIVIES.

Judgment against executor or administrator binding upon,—see Judgments, 9.

Who are privies,—see Judgments, 10.

PROFITS.

Secret—Fraud—Evidence—Insufficiency,—see Brokers, 1.

PROMISSORY NOTES.

Pleading—Inconsistent Defenses—Election of Remedies.

1. Where, in an action on a promissory note and to foreclose a mortgage, defendants denied generally the making and delivery of the instruments, and in two special defenses alleged affirmatively that they were in fact executed and delivered to plaintiff, and in a third pleaded fraud, the pleading was so incongruous as to require them to elect upon which defense they intended to rely, under the

rule that while inconsistent defenses may be pleaded, they must not be so incompatible with each other that if one be true, the other must of necessity be false.—International Harvester Co. v. Merry, 498.

Same—Waiver of All Defenses Pleaded, When.

2. *Held,* under the condition of the answer set forth in paragraph 1 above, that the statements of defendants' counsel that they would waive all special defenses except that of fraud, and, upon an adverse ruling upon the sufficiency of the latter defense, that they would rest, amounted to a waiver and abandonment of all the other defenses pleaded.—International Harvester Co. v. Merry, 498.

Compromise and Settlement—Answer—Readiness and Ability to Perform.

3. Where settlement and compromise are alleged in answer to a complaint on a promissory note, whereby plaintiff harvester company was to take back a plowing outfit, defendants to pay plaintiff a certain sum, it was incumbent upon defendants to plead their readiness and ability to perform their part of the undertaking.—International Harvester Co. v. Merry, 498.

Same—Fraud—Breaking of Promise—Intent.

4. The mere making of a promise which the promisor fails to keep does not constitute actionable fraud, intention not to keep it when it was made, being necessary to constitute the promisor's action fraudulent, under section 4978, Revised Codes.—International Harvester Co. v. Merry, 498.

PROSTITUTION.

White slavery—Evidence—Insufficiency,—see Criminal Law, 39.

PUBLIC LANDS.

Authority of courts,—see Real Property, 14.

Error in survey—Estoppel—Adverse possession gives no title against government,—see Real Property, 9-11.

Erroneously left unsurveyed, open to settlement,—see Real Property, 13.

Surveys—Effect of meander on rights of riparian owner,—see Real Property, 7.

PUBLIC POLICY.

Collusion between husband and wife to secure divorce,—see Husband and Wife, 3.

QUANTUM MERUIT.

Special contract—Measure of recovery,—see Contracts, 4.

QUIETING TITLE.

Action lies to quiet title to an easement,—see Easements, 3.

RAILROADS.

See, also, Personal Injuries, 3–17, 25, 26.

Obstruction of watercourse by embankment—Surface waters,—see Waters and Watercourses, 1, 2.

Unreasonable Rates—Railroad Commission Act—Remedies Exclusive—Complaint—Insufficiency.

1. *Held*, that the remedies prescribed by Chapter 37, Laws of 1907 (Rev. Codes, secs. 4363–4399), for recovery of damages caused by the exaction of discriminatory or unreasonable freight charges, are exclusive, and that therefore a complaint based upon the common-law remedy and drawn in entire disregard of the provisions of the statute did not state a cause of action, the common-law remedies having been superseded by said chapter.—Doney v. Northern Pacific Ry. Co., 209.

Same—Complaint—Jurisdictional Allegation.

2. Under section 4389, Revised Codes, an allegation that payment of alleged discriminatory or unreasonable freight charges was made in the county in which the action is brought is jurisdictional.—Doney v. Northern Pacific Ry. Co., 209.

Same—Presumptions—Complaint—Insufficiency.

3. Since the presumption obtains that the railroad commission fixed and established reasonable rates in obedience to section 4375, Revised Codes, and that the rate as established is in accordance with the approved and published tariff, a complaint which fails to allege that freight charges were not in accordance with such tariff is defective. Doney v. Northern Pacific Ry. Co., 209.

Same—Railroad Commission—Established Tariff has Effect of Statute.

4. A tariff duly filed and published by the railroad commission has the force and effect of a statute and is binding alike upon the shipper and carrier, until modified by the tribunal authorized to change it.—Doney v. Northern Pacific Ry. Co., 209.

Same—Railroad Commission Act—Remedies—Extent of Saving Clause.

5. The provision of section 4398, Revised Codes, that the Railroad Commission Act shall not have the effect of releasing or waiving "any right of action * * * by any person for any right, penalty or forfeiture which may have arisen or may hereafter arise under any law of this state," *etc.*, does not have the effect of saving the common-law remedy for recovery of excess freight rates, but refers to the remedies provided by the Act itself.—Doney v. Northern Pacific Ry. Co., 209.

Same—Voluntary Reduction of Rates—Effect.

6. The voluntary reduction of a rate by a carrier does not make the prior rate unlawful, unreasonable or discriminatory or the basis of an action for damages.—Doney v. Northern Pacific Ry. Co., 209.

Same—Unjust Rates—Remedies—Procedure.

7. A shipper deeming himself aggrieved by a rate fixed by the railroad commission because unjust, unreasonable or discriminatory, must proceed under section 4391, Revised Codes, if he desires to have it declared so; where no rate has been fixed or the one established is considered excessive, he must apply to the commission for investigation and determination of his contention, under section 4377, before he can maintain an action in the courts; and if his case is predicated upon freight charges made in excess of those fixed and established by the commission, his complaint must so allege and the action must be brought within twelve months from the date of payment, under section 4389.—Doney v. Northern Pacific Ry. Co., 209.

Delay in Shipment of Freight—Special Damages—Notice to Carrier of Urgency of Shipment Necessary.

8. In order to charge a carrier with special damages arising from delay in the shipment of freight, such as stock feed, notice of the urgency of the shipment must be brought home to the carrier.—Sankey v. Chicago, Mil. & St. P. Ry. Co., 242.

Crossing Accident—Automobiles—Duty to Make Act of Looking and Listening Effective.

9. One approaching a railroad crossing must use his senses vigilantly to determine whether or not a train is approaching before he goes on the track, and if necessary to make his act of looking and listening reasonably effective, stop at such point as will accomplish that purpose.—Keith v. Great Northern Ry. Co., 505.

Same—Evidence—Contributory Negligence.

10. Where, in an action to recover damages for injuries to plaintiff's automobile caused by a collision with defendant's train at a railroad crossing, it appeared from the evidence that, after he saw the train, he had twenty-six feet before he reached the crossing within which to stop, and could have stopped within a distance of seven feet if traveling at a rate of eight miles an hour, as testified to by him, with the car under proper control, and that he did not apply the brakes until after the front wheels of his automobile were on the track, he was guilty of contributory negligence as a matter of law, and therefore barred from recovery of damages.—Keith v. Great Northern Ry. Co., 505.

RAPE.

See Criminal Law, 93.

Attempt to commit,—see Criminal Law, 3–10.

RATES.

Unreasonable railroad rates—Remedies,—see Railroads, 1–7.

REAL PROPERTY.

See, also, Brokers; Contracts; Easements; Husband and Wife; Quieting Title.

Easements—Presumptions.

1. As respects easements, the parties to a contract of sale of land are presumed to have contracted with reference to the conditions of the property at the time of sale, provided the marks are open and visible.—Pioneer Mining Co. v. Bannack Gold Mining Co., 254.

Implied Easements—Intent.

2. An implied easement rests upon implied intent gathered from the circumstances surrounding the conveyance.—Pioneer Mining Co. v. Bannack Gold Mining Co., 254.

Easements—When Apparent.

3. An easement is apparent when it may be discovered upon reasonable inspection.—Pioneer Mining Co. v. Bannack Gold Mining Co., 254.

Ouster—Intent.

4. An entry by one upon the land of another is an ouster of the legal possession arising from the title, or not, according to the intention with which it is done.—Pioneer Mining Co. v. Bannock Gold Mining Co., 254.

Streams—"Accreted Lands"—Ownership in Riparian Owner.

5. Under sections 4573 and 4576, Revised Codes, "accreted lands"—that is, additions to the area of real estate from the gradual deposit by water of solid material, whether mud, sand or sediment, producing dry land which before was covered by water, along the banks of a navigable or unnavigable stream—belong to the riparian owner.—Bode v. Rollwitz, 481.

Title by Accretion or Reliction—How Governed.

6. Title to lands acquired by accretion or reliction is governed by the laws of the state where either occurs.—Bode v. Rollwitz, 481.

Public Lands—Survey—Waters—Effect of Meander on Rights of Riparian Owner.

7. Where, in the survey of the public domain, a body of water is found to exist and is meandered, the result of such meander is to exclude the area from the survey, and to cause it as thus separated to become subject to riparian rights of the respective owners abutting on the meandered line in accordance with the laws of the several states.—Bode v. Rollwitz, 481.

Waters and Watercourses—Sudden Change of Channel—Effect.

8. Where the channel of a river is suddenly and sensibly changed, as by reason of an ice gorge, so that the old channel is abandoned, except in high water, and a new channel formed, no change in the boundary or ownership of land of riparian owners is worked thereby. Bode v. Rollwitz, 481.

Public Lands—Adverse Possession Gives No Title Against Government—Error by Surveyor.

9. Since adverse possession, user or occupancy of public land cannot ripen into a good title as against the government, possession and occupancy of islands which were in existence at the time of the government survey, though not mentioned on the official plat but referred to in the surveyor's field-notes, the surveyor having erroneously failed to extend the survey over them, did not vest title in plaintiff by adverse possession, nor did his error prevent the government from subsequently surveying them and asserting title thereto.—Bode v. Rollwitz, 481.

Same—Government Surveyors—Authority.

10. Government surveyors are not invested with authority to determine the character of land surveyed or left unsurveyed, or to classify it as within or without the operation of particular laws.—Bode v. Rollwitz, 481.

Same—Land Department—Error by Officers Does not Estop Government.

11. The fact that administrative government officers, before discovery of a surveyor's error in failing to survey islands in a river and including them as part of a meandered tract shown in the river, had treated such a meandered tract as subject to the riparian rights of abutting owners, under state laws, could not estop the United States from asserting its title even as against such an owner who had acquired his property before the mistake was discovered.—Bode v. Rollwitz, 481.

Same—Islands—Patent to Land Abutting on River Does not Include.

12. Patents to lots of land abutting on a river do not include actual islands of fast dry land of stable foundation lying between the lots and the thread of the stream.—Bode v. Rollwitz, 481.

Same—What Lands Open to Settlement.

13. Under the homestead laws of the United States, unsurveyed public lands, if agricultural and unappropriated, are open to settlement by qualified entrymen, and this applies to land erroneously left unsurveyed and by the surveyor included within the meander lines of a non-navigable river.—Bode v. Rollwitz, 481.

Same—Authority of Courts.

14. While the courts have nothing to do with public land surveys, they may determine whether lands have been left unsurveyed and whether a right of possession exists under an inceptive claim.—Bode v. Rollwitz, 481.

Ejectment—Adverse Possession—Payment of Taxes—Evidence.

15. Since payment of taxes was not, prior to the enactment of Chapter 3, Laws of 1917, an element of adverse possession, the fact that the holder of the legal title paid the taxes on the land in question was of no evidentiary value, further than as tending to show that he had not abandoned it.—Blackfoot Land Dev. Co. v. Burks, 544.

Same—Declarations by Claimant not Controlling.

16. The fact that the holder of land under an adverse claim did not declare that he owned the land or that he was holding it adversely to the interest of the true owner, is not of controlling weight as evidence, since the question of adverse title is determinable by the claimant's actions rather than words.—Blackfoot Land Dev. Co. v. Burks, 544.

Same—Occupation Deemed in Subordination to Legal Title.

17. Under section 6435, Revised Codes, the occupation of property by one not the owner is deemed to have been under and in subordination to the legal title.—Blackfoot Land Dev. Co. v. Burks, 544.

Same—Possession Alone Insufficient to Support Claim.

18. The question of adverse possession is one of intention, and the possession must be of such a character as to afford the owner the means of knowing of the claim asserted, possession alone, though open and notorious, being insufficient.—Blackfoot Land Dev. Co. v. Burks, 544.

Same—Evidence—Insufficiency.

19. Evidence, in an action in ejectment the defense to which was title by adverse possession, that defendant's predecessor to whose interest in the land he succeeded under a will, had fenced the land in connection with a portion of his own, and occupied and cultivated it, that he repeatedly endeavored to purchase it from plaintiff; that defendant, closely associated with decedent did not know that it was being held adversely by decedent, and, as executor of his estate, did not list the property in his inventory, *etc.*, *held* insufficient to warrant a judgment in his favor.—Blackfoot Land Dev. Co. v. Burks, 544.

Same—Insufficiency of Evidence—Taking Case from Jury not Denial of Trial by Jury.

20. The evidence in support of defendant's claim having been insufficient to sustain either a verdict or finding in his favor, the court did not err in taking the case from the jury, setting aside its findings, making findings of its own and rendering judgment for plaintiff, and its action was not objectionable as depriving defendant of his right of trial by jury.—Blackfoot Land Dev. Co. v. Burks, 544.

RECEIVERS.

Costs—To whom taxable,—see Costs, 2.

Taxation of costs—Reviewable on appeal from judgment,—see Costs, 1.

When not to be Appointed.

1. Since the appointment of a receiver without notice is a harsh remedy, under which property rights are taken out of private hands and put in hands of a representative of the court, solely as an emergency measure, it should not be invoked if the applicant has any other adequate remedy.—Martin v. Hover, 302.

Insolvency of Defendant—Insufficient Showing.

2. Where, in an action to set aside an oil lease as fraudulent, the complaint and affidavit of plaintiffs upon which a receiver was appointed without notice, did not affirmatively show that defendants were insolvent, the appointment was unwarranted.—Martin v. Hover, 302.

Complaint and Affidavit—Verification.

3. A receiver may be appointed upon the complaint if verified upon positive knowledge, or upon the complaint and a proper affidavit so verified.—Martin v. Hover, 302.

Complaint—Verification by Mentally Incompetent—When Insufficient.

4. Where the complaint in an action to set aside an oil lease on the ground of fraud alleged, *inter alia*, that the lessor was not only ignorant and without experience in business, but so far incompetent as to be incapable of understanding ordinary legal instruments and ever ready to follow any suggestions made or advice given him by one in whom he had confidence, his verification attached to the complaint had no evidentiary value, and was therefore insufficient as a foundation for the appointment of a receiver without notice.—Martin v. Hover, 302.

RECEIVING STOLEN PROPERTY.

See Criminal Law, 30–32, 88–91.

RECORD ON APPEAL.

Duty of counsel,—see Appeal and Error, 5.

From final judgment—Bills of exception,—see Appeal and Error, 9.

REHEARINGS.

See Appeal and Error, 3, 19.

REMEDIES.

Election of,—see Pleading and Practice, 31.

Of one complaining of unreasonable railroad rates,—see Railroads, 1–7.

RES ADJUDICATA.

See Judgments, 6–13.

RESCISSION.

See Contracts, 17–22.

RESULTING TRUSTS.

See Trusts.

EXEMPT LANDS.
See Real Property, 5-14.

EXILE.
Of supreme court—Assignments of error—Briefs,—see Appeal and Error, 12, 26.

SALES.
See Contracts, 5-12.

SEARCH-WARRANTS.
See Intoxicating Liquors.

SECRETARY OF STATE.
Foreign Corporations—Capital stock—Certificate of increase—Filing fees,—see Corporations, 3, 4.

SECTIONS.
See Criminal Law, 55-57.

SELF-SERVING DECLARATIONS.
Inadmissibility,—see Evidence, 20.

SERVICE.
By mail of notice of overruling of demurrer,—see Pleading and Practice, 11-14.

SHERIFFS.
Entitled to compensation received by counties for keep of federal prisoners, —see Counties, 2-5.

SPECIAL IMPROVEMENT DISTRICTS.
See Cities and Towns, 1-3, 7-9.

STATE RAILROAD COMMISSION.
Unreasonable rates—Remedies,—see Railroads, 1-7.

STATUTES.
(List of Statutes of Montana Cited or Commented upon.)

COMPILED STATUTES OF 1872.
Section 1275 (Jails)..... 163

LAWS OF 1877.
Section 229 (Executors and Administrators)..... 47

LAWS OF 1879.
Section 229, Second Division (Executors and Administrators)..... 47

COMPILED STATUTES OF 1887.
Section 229, Second Division (Executors and Administrators)..... 47

LAWS OF 1889.
Page 146 (Executors and Administrators)..... 47

POLITICAL CODE OF 1895.

Section 3026 612

CIVIL CODE OF 1895.

Section 2734 47

CODES OF 1907.

Section 165 381
Section 1337 117
Section 1340 117
Sections 2085–2087 ..... 207, 208
Section 2283 103
Section 2284 103
Section 2286 103
Section 2289 103
Section 2293 102
Section 3010 615
Section 3138 616
Section 3259 116
Section 3301 452
Section 3302 452
Section 3552 523
Section 3677 ..... 413, 414
Section 3678 413
Section 3679 413
Section 3695 249
Section 3783 413
Section 4275, subdivision 5 ..... 524, 525
Section 4362 ..... 524, 525
Sections 4363–4399 ..... 227 *et seq.*
Section 4384 234
Section 4391 234
Section 4425 513
Section 4428 265
Section 4429 265
Section 4507 512
Section 4515 ..... 513, 514
Section 4535 ..... 207, 208
Section 4538 250
Section 4573 491
Section 4576 491
Section 4632 338
Section 4758 537
Section 4759 537
Section 4760 537
Section 4777 537
Section 4778 537
Section 4779 537
Section 4787 ..... 298, 537
Section 4789 537
Section 4790 537
Section 4796 537
Sections 4799–4800 298
Section 4801 537
Section 4804 537
Section 4820, subdivision 2 185
Section 4842 265
Section 4844 265

Section 4970 274
Section 4978 505
Section 5065 607
Section 5084 339
Section 5092 .....80, 81
Section 5469 52
Section 5494 .....45, 52
Section 5628 556
Section 5757 80
Sections 5774–5799 146
Section 6056 .....176, 241
Section 6065 245
Section 6068 22
Section 6082 .....176, 241
Section 6192 15
Section 6253 115
Section 6357 478
Section 6432 .....114, 116
Section 6435 .....114, 116, 551
Section 6449, subdivision 4.....84, 289
Section 6451 289
Section 6480 .....164, 165
Section 6486 182
Section 6532 458
Section 6535 458
Section 6594 186
Section 6710 296
Section 6714, subdivision 6..... 186
Section 6746 .....22, 269
Section 6787 191
Section 6788 190
Section 6793 162
Section 6794 .....67, 162
Section 6797 .....170, 171
Section 6806 190
Section 6849 514
Section 6870 .....513, 514
Sections 7092–7095.....452, 453
Section 7098 .....191, 491
Section 7112 .....190, 191
Section 7148 186
Section 7452 298
Section 7454 298
Section 7502 297
Section 7525 55
Section 7530 298
Section 7536 296
Section 7607 .....45 *et seq.*
Section 7648 295
Section 7664 534
Section 7669 .....534, 539
Section 7724 540
Section 7725 541
Section 7738 541
Section 7853 374
Section 7872 126
Sections 7875, 7876..... 446
Section 7887 326

Section 7887, subdivision 10.....437, 438
Section 7914 296
Section 7917 297
Section 7962, subdivision 4..... 191
Section 7962, subdivision 15..... 126
Section 7962, subdivisions 15, 33..... 229
Section 8020 360
Section 8024 .....446, 447
Section 8028 557
Section 8070 537
Section 8290 576
Section 8642, subdivision 2..... 340
Section 8656 339
Section 8658 341
Section 8904 446
Sections 8905–8907 447
Section 8907 446
Section 9087 126
Section 9089 126
Section 9149 420
Section 9234 478
Section 9237 478
Section 9238 476
Section 9241 477
Section 9264 328
Section 9271 .....128, 330, 374
Section 9271, subdivision 4..... 574
Section 9282 .....440, 575
Section 9350 315
Section 9415 313
Section 9484 405
Sections 9584–9629 452
Section 9759 615
Section 9763 .....614 *et seq.*
Section 9764 615

LAWS OF 1907.

Chapter 37 (Railroad Commission Law).....226 *et seq.*

LAWS OF 1911.

Chapter 1 (White Slavery) 378
Chapter 29 (Employers' Liability Act)..... 108
Chapter 52 (Chattel Mortgages) 80, 81

LAWS OF 1913.

Chapter 52 (Public Service Commission)..... 237
Chapter 86 (Chattel Mortgages) 80
Chapter 89 (Special Improvements) .....2, 6, 588 *et seq.*

LAWS OF 1915.

Chapter 37 (Secretary of State—Fees) 383
Chapter 113 (Easements—Quieting Title) 513
Chapter 135 (Exceptions) 314
Chapter 142 (Special Improvements) 2, 588, 591
Chapter 175 (Special Improvements) 2

LAWS OF 1917.

Chapter 3 (Adverse Possession)..... 551

STATUTES AND STATUTORY CONSTRUCTION.

Constitutionality of statutes,—see Constitution, 1.

Extension of time for answer—Statute,—see Pleading and Practice, 13.

Record on appeal from final judgment—Bills of exceptions—Statutes,—see Appeal and Error, 9.

Statutes—Adoption from Another State—Construction.

1. Adoption of a statute from another state carries with it the construction placed thereon by the highest court of the state from which it is adopted.—Mares v. Mares, 36.

Witnesses—Former Conviction of Misdemeanor—Improper Impeachment.

2. *Held*, that the provision of section 8907, Revised Codes, to the effect that the conviction of a person of any offense may be proved for the purpose of affecting the weight of his testimony, refers to conviction for a felony and not for a misdemeanor.—State v. Stein, 441.

STATUTES OF LIMITATIONS.

See Limitations of Actions.

STENOGRAPHERS.

Witness reading from notes,—see Criminal Law, 26.

STOCK AND STOCKHOLDERS.

See Corporations.

STREET RAILWAYS.

See Personal Injuries, 19–24.

SUPREME COURT.

See, also, Appeal and Error.

May supreme court award adequate damages without awarding new trial,—see Personal Injuries, 23.

Rehearings—Extent of review,—see Appeal and Error, 3, 19.

Rules with reference to preparation of briefs,—see Appeal and Error, 13.

SURFACE WATERS.

Obstruction by railroad embankment,—see Waters and Watercourses, 1, 2

SURVEYORS.

Authority—Errors—Effect,—see Real Property, 7, 9, 10–12.

TECHNICALITIES.

See Criminal Law, 8, 40, 63; Instructions, 1.

TENDER.

Of deed, when too late,—see Contracts, 17.

THEORY OF CASE.

Amendment of complaint to conform to proof—Rule not applicable when amendment does not conform to theory upon which cause was tried,—see Pleading and Practice, 23.

Parties bound on appeal by theory adopted at trial of cause,—see Appeal and Error, 28.

"THIRD DEGREE."

Improper methods in obtaining statement by defendant charged with crime —Not ground for new trial,—see Criminal Law, 53.

TIME.

See, also, Limitations of Actions.

Extension of time for answer after demurrer overruled,—see Pleading and Practice, 13, 14.

For preparation for trial,—see Criminal Law, 74.

Of essence of contract of sale of real property—Tender of deed—When too late,—see Contracts, 17.

TITLE.

By adverse possession does not run against government,—see Real Property, 9.

Real property—Imperfect title—When rescission may be decreed,—see Contracts, 18, 19.

Trusts—Personal Property.

1. In a trust of personal property the legal title is in the trustee.—State v. Wallin, 332.

TRIAL.

See, also, different subjects pertaining to Trial.

By jury — Ejectment — Adverse possession — Insufficiency of Evidence — Taking case from jury not denial of jury trial,—see Real Property, 20.

Continuance—Affidavit—Contents—Insufficiency—Discretion,—see Criminal Law, 70–73.

Preparation for trial—Time—Sufficiency,—see Criminal Law, 74.

On Agreed Statement—Waiver of Defects—Variance—Appeal.

1. Where a cause is tried on an agreed statement of facts which purports to contain all of the evidence, the pleadings become immaterial except in so far as admissions therein contained are concerned, the trial court must render judgment on the merits of the case as disclosed by such statement, and the supreme court on appeal will affirm the judgment where under the facts as agreed plaintiff was entitled to prevail even though there was a fatal variance between the pleadings and the proof.—United States Nat. Bank v. Great Western Sugar Co., 342.

TRUSTS.

See, also, Promissory Notes, 5, 6.

Resulting trust—Conveyance between husband and wife—Gift—Presumptions—Laches,—see Husband and Wife, 6, 7.

When beneficiary under will not entitled to interest,—see Executors and Administrators, 8.

Personal Property—Legal Title, in Whom.

1. In a trust of personal property, the legal title is in the trustee.—State v. Wallin, 332.

UNITED STATES SUPREME COURT.

Federal Questions—Decision of United States Supreme Court Conclusive.

1. In a case involving a federal question, the decisions of the supreme court of the United States are conclusive and binding upon state courts.—J. I. Case Threshing Machine Co. v. Stewart, 380.

VARIANCE.

Waiver—Trial on agreed statement of facts,—see Pleading and Practice, 24.

VENUE.

See, also, Change of Venue.

Proof Required.

1. In a prosecution for receiving stolen property, the state must prove the venue as laid in the information, by evidence which establishes the fact beyond a reasonable doubt.—State v. Ducolon, 594.

When Crime Complete and Venue Fixed.

2. When property is received with knowledge that it was stolen, and with the criminal intent defined by the statute, the crime is complete and the venue fixed.—State v. Ducolon, 594.

Circumstantial Evidence—When Sufficient.

3. The venue as well as the *corpus delicti* in a prosecution for receiving stolen property may be established by circumstantial evidence, provided the criminatory circumstances proved are consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis.—State v. Ducolon, 594.

Evidence—Insufficiency.

4. In the absence of direct evidence showing that defendant, who was found in the possession of stolen cattle in a county other than the one in which he was charged with having received them, came into their possession in the county in which the venue was laid, and of circumstantial evidence sufficient to meet the requirements of the rule above (par. 3), the trial court was without jurisdiction to render a judgment of conviction.—State v. Ducolon, 594.

VERDICTS.

See, also, Criminal Law, 18, 19.

On conflicting evidence, when verdict not conclusive,—see Personal Injuries, 8.

Refusal of motion for directed verdict for defendant error,—see Personal Injuries, 24.

Quotient Verdict—New Trial.

1. Where the jurors in a personal injury action agreed among themselves that in arriving at a verdict each of them should write the amount he deemed plaintiff entitled to upon a slip of paper, the several amounts to be added by one of their number, acting as clerk, and the sum total divided by twelve, the amount thus arrived at to stand as their verdict, the result was a quotient verdict entitling defendant to a new trial.—Zanos v. Great Northern Ry. Co., 17.

Nuisance—What not Excessive Verdict.

2. A verdict for $2,000 in an action for damages for maintaining a nuisance, where it appeared that besides losing $15 rental a month of a house and garden for about a year, plaintiff lost the use of a quarter-section of land with improvements thereon, and suffered discomfort and annoyance for practically two years, *held* not excessive, it being impossible in such a case to lay down a fixed measure of damages.—Newton v. City of Roundup, 24.

Order Setting Aside Under Guise of Correcting Minutes, Void.

3. *Held,* that a verdict arrived at, received and filed in regular manner, eight of the jurors, upon their poll, answering in the affirmative, could not be set aside on motion, supported by the affidavit of one of them to the effect that he had answered in the negative, asking specifically that it be set aside, under the pretension that its purpose was merely to correct the minutes of the court.—Currey v. Butte Electric Ry. Co., 146.

Directed Verdict—Motion by Both Parties—New Trial.

4. Where both parties moved for a directed verdict, thus in effect submitting the cause upon an agreed statement of facts, the court may nevertheless grant the defeated party a new trial if it deems the verdict as directed by it erroneous.—Buckhouse v. Parsons, 156.

WAIVER.

Of defects in pleading—Variance—Trial on agreed statement of facts,—see Pleading and Practice, 24.

Of defenses pleaded—What constitutes,—see Pleading and Practice, 32.

Of right to rescind,—see Contracts, 22.

WARRANTS.

Municipal—Issuance at discount prohibited,—see Cities and Towns, 9.

WATERS AND WATERCOURSES.

Flumes—Easements,—see Mines and Mining, 10–12.

Riparian and nonriparian lands,—see Real Property, 5–14.

Sudden change of watercourse—Effect on boundary of land of riparian owner,—see Real Property, 8.

"Watercourse"—Definition.

1. A "watercourse" is a living stream with defined banks and channel, not necessarily running all the time, but fed from other and more permanent sources than mere surface water.—Le Munyon v. Gallatin Valley Ry. Co., 517.

Surface Waters—Obstruction by Railroad Embankment—When Defendant not Liable for Damages.

2. Under the common-law rule of liability for the obstruction of surface waters, in force in this state in the absence of statute providing otherwise, defendant railway company was not liable for damage caused to plaintiff's property by surface waters which were dammed up by its embankment and for the escape of which it had failed to construct culverts or openings, its duty in this respect being confined, by subdivision 5 of section 4275 and section 4362, Revised Codes, to providing outlets for streams, watercourses, etc., intersected by the embankment, plaintiff's evidence having failed to establish that the invading waters were conveyed through a natural watercourse.—Le Munyon v. Gallatin Valley Ry. Co., 517.

WHITE SLAVERY.

See Criminal Law, 39.

WILLS.

"Devises"—"Bequests,"—see Executors and Administrators, 5–7.

WITNESSES.

See, also, Evidence.

Expert and opinion evidence,—see Evidence, 24–27.

When Mental Incompetents may Testify.

1. The testimony of an incompetent person is admissible in evidence if the court is satisfied that he has sufficient mentality to appreciate the nature and obligation of an oath and is capable of giving a correct account of the matters which he has seen or heard with reference to the question at issue, his incompetency going only to the weight of his evidence.—Martin v. Hover, 302.

Rape—Credibility of Prosecuting Witness—Question for Jury.

2. The credibility of the prosecuting witness in a prosecution for attempted rape was a matter for determination by the jury, and its verdict of guilty establishes the truth of her testimony for all purposes.—State v. Prouty, 310.

Criminal Law—Witnesses—Former Conviction of Misdemeanor—Improper Cross-examination.

3. *Held*, that the provision of section 8907, Revised Codes, to the effect that the conviction of a person of any offense may be proved for the purpose of affecting the weight of his testimony, refers to conviction for a felony, and that therefore refusal to permit cross-examination of a witness for the state as to his former conviction of a misdemeanor was proper.—State v. Stein, 441.

WORDS AND PHRASES.

"Accreted lands"—

Bode v. Rollwitz, 491.

"Admission"—

State v. Stevens, 402.

"Adverse possession"—

Blackfoot L. & Dev. Co. v. Burks, 551, 552.

"Alibi"—

State v. Bess, 573.

"Bequest"—

In re Fratt's Estate, 537.

"Board"—(Rev. Codes 1907, sec. 3138.)

Majors v. Lewis and Clark County, 616.

"Character" of special improvements—(Chap. 142, sec. 2, Laws 1915.)

Evans v. City of Helena, 589.

"Commensurate" with earnings—

Donovan v. Bull Mt. Trading Co., 95.

"Confession"—
State v. Stevens, 402.

"Devise"—
In re Fratt's Estate, 537.

"Easement"—
Mannix v. Powell County, 512.

"Easement" apparent—
Pioneer Min. Co. v. Bannack Gold Min. Co., 264.

"Expressly"—(Rev. Codes 1907, sec. 4970.)
McKeever v. Oregon Mortgage Co., 274.

"General character" of improvements (Chap. 142, sec. 2, Laws 1915.)
Evans v. City of Helena, 589.

"General damages"—
Whitelaw v. Vallance, 176.
Sankey v. Chicago etc. Ry. Co., 244.

"Implied easement"—
Pioneer Gold Min. Co. v. Bannack Gold Min. Co., 264.

"Incidental work"—
Evans v. City of Helena, 588 *et seq.*

"Inheritance tax"—
In re Fratt's Estate, 540.

"Journal entry"—
Currey v. Butte Electric Ry. Co., 153.

"Judgment"—(Rev. Codes 1907, sec. 6710.)
In re Smith's Estate, 293.

"Laches"—
Clary v. Fleming, 253.

"Larceny"—
State v. Wallin, 340.

"Motive"—
State v. Bennett, 361.

"Necessary"—"Necessity"—
Pioneer Gold Min. Co. v. Bannack Gold Min. Co., 264.

"Negligence"—
Zanos v. Great Northern Ry. Co., 21.

"Ouster"—
Pioneer Gold Min. Co. v. Bannack Gold Min. Co., 265.

"Privies"—
In re Smith's Estate, 299.

"Probable cause"—
Hawley v. Richardson, 127.

"Quotient Verdict"—
Zanos v. Great Northern Ry. Co., 21.

"Reasonable doubt"—
State v. Bess, 574.

"Receivership"—
Martin v. Hover, 306.

"*Res adjudicata*"—
In re Smith's Estate, 293.

"Special damages"—
Whitelaw v. Vallance, 176.
Sankey v. Chicago etc. Ry. Co., 244.

"Subsistence"—(U. S. Rev. Stats., sec. 5547.)
Majors v. Lewis and Clark County, 615.

"Support"—(Rev. Codes 1907, sec. 9763.)
Majors v. Lewis and Clark County, 615.

"Surface waters"—Le Munyon v. Gallatin V. Ry. Co., 523.

"The managers or proper authorities"—(U. S. Rev. Stats., sec. 5547.)
Majors v. Lewis and Clark County, 615.

"Watercourse"—
Le Munyon v. Gallatin V. Ry. Co., 523.

"Within a given number of days"—(Rev. Codes 1907, sec. 7148.)
Batchoff v. Butte etc. C. Co., 187.

WORK AND LABOR.
See Contracts, 1–4.

WRITS.
See Certiorari; Injunctions.

TABLE OF MONTANA CASES CITED—VOL. 60.

Adlam v. McKnight, 32 Mont. 349..... 339
(Larceny—Identification of Property.)
Ahlstrom v. Fitzpatrick, 17 Mont. 295..... 93
(Vague Contracts Void.)
Aiken v. City of Glendive, 60 Mont. 1..... 7
(Cities and Towns—Special Improvements.)
Allen v. Bear Creek Coal Co., 43 Mont. 269..... 269
(Appeal—Instructions—Review.)
(Negligence—Complaint—Inferences)..... 465
Allen v. City of Butte, 55 Mont. 205..... 5
(Cities and Towns—Special Improvements.)

Barnard Realty Co. v. City of Butte, 48 Mont. 102, 55 Mont. 384.... 115
(Streets—Quieting Title—Equity.)
(Cities and Towns—Prescription)..... 116
Barnes v. Smith, 48 Mont. 309..... 143
(Corporate Stock Owned by One Person—Effect.)
Beck v. Holland, 29 Mont. 234..... 229
(Official Duties—Presumptions.)
Bielenberg v. Eyre, 44 Mont. 397..... 203
(Verdicts—Scaling.)
Birsch v. Citizens' Electric Co., 36 Mont. 574..... 22
(Personal Injuries—"Negligence.")
Boehme v. Fitzgerald, 43 Mont. 226..... 52
(Partnership.)
Bosanatz v. Ostronich, 57 Mont. 197..... 34
(Equity—Finding of Jury Advisory).....34, 35
Botkin v. Kleinschmidt, 21 Mont. 1..... 298
(Claims Against Estates.)
Bourke v. Butte Elec. & P. Co., 33 Mont. 267..... 23
(Personal Injuries—Earning Capacity—Instructions.)
Bramlett v. Flick, 23 Mont. 95..... 266
(Ouster.)
Brange v. Bowen, 57 Mont. 77..... 171
(New Trial.)
Brazell v. Cohn, 32 Mont. 556..... 176
(General and Special Damages.) DISTINGUISHED.
Brundy v. Canby, 50 Mont. 454..... 253
(Laches.)
Burton v. Kipp, 30 Mont. 275..... 229
(Official Duty—Presumptions.)
Butte Hardware Co. v. Knox, 28 Mont. 111..... 86
(Fraud.)

Campbell v. Flannery, 29 Mont. 246..... 523
(Surface Waters.)
Carlson v. Stone-Ordean-Wells Co., 40 Mont. 434..... 176
(General and Special Damages.) DISTINGUISHED.

Chessman v. Hale, 31 Mont. 577..... 552
(Jury Trial.)
Chicago etc. Ry. Co. v. Swindlehurst, 47 Mont. 119..... 382
(Foreign Corporations—Articles of Incorporation.)
Cooper v. City of Bozeman, 54 Mont. 277..... 5
(Cities and Towns—Special Improvements.)
Cottonwood Ditch Co. v. Thom, 39 Mont. 115..... 514
(Easements—Quieting Title.)
Crosby v. Robbins, 56 Mont. 179..... 81
(Implied Findings.)
Cuerth v. Arbogast, 48 Mont. 209..... 80
(Transfer of Real Property.)
Cummins v. Cummins, 59 Mont. 225..... 415
(Divorce—Alimony—Discretion.)
Currey v. Butte El. Ry. Co., 60 Mont. 146..... 449
(Pleadings—Construction—Jury—Verdict—Impeachment.)

Daniels v. Granite Bi-Metallic Co., 56 Mont. 284..... 69
(Witness—Credibility.)
Da Rin v. Casualty Co., 41 Mont. 175..... 557
(Life Insurance—Proof of Loss.)
Dawes v. Great Falls, 31 Mont. 9..... 29
(Nuisances—Complaint.)
Dean v. Stewart, 49 Mont. 506..... 34
(Conflict in Evidence—Verdict Conclusive.)
Dolenty v. Broadwater County, 45 Mont. 261..... 209
(Statutory Right—Time Essence of Right.)
Dunseth v. Butte Electric Ry. Co., 41 Mont. 14..... 299
(*Res Adjudicata.*)

Eby v. City of Lewistown, 55 Mont. 113..... 209
(Statutory Rights—Time of Essence.)
Ecclesine v. Great Northern Ry. Co., 58 Mont. 470..... 458
(Trial—Complaint—Sufficiency—How Tested.)
Edwards v. Plains L. & W. C., 49 Mont. 535..... 143
(Corporate Stock Owned by One Person—Effect.)
Eisenberg v. Goldsmith, 42 Mont. 563..... 55
(Resulting Trusts.)
Ervin v. Collier, 2 Mont. 605..... 145
(Receivers—Taxation of Costs.)
Ettien v. Drum, 32 Mont. 311..... 171
(New Trial—Review.)

Ferrat v. Adamson, 53 Mont. 172..... 458
(Complaint—Sufficiency—How Tested.)
Fifty Associates Co. v. Quigley, 56 Mont. 348..... 163
(Appeal and Error—New Trial.)
First Nat. Bank v. Silver, 45 Mont. 231..... 52
(Partnership.)
Flaherty v. Butte Electric Ry. Co., 42 Mont. 89..... 203
(Personal Injuries—Scaling Verdict.)
Fordham v. Northern Pac. Ry. Co., 30 Mont. 421..... 522
(Surface Waters.)
Forrester v. Boston etc. Min. Co., 21 Mont. 565..... 55
(Rehearing—Grounds.)
Foresell v. Pittsburgh etc. C. Co., 38 Mont. 403..... 30
(Complaint—Sufficiency.)

Gans v. Woolfolk 2 Mont. 458..... 203
(Scaling Verdict.)
Gauss v. Trump, 48 Mont. 92..... 296
(Claims Against Estates.)
Gelsthorpe v. Furnell, 20 Mont. 299..... 541
(Inheritance Taxes.)
George v. Northern Pac. Ry. Co., 59 Mont. 162..... 509
(Railroad Crossings—Duty of Pedestrians.)
Gibson v. Morris State Bank, 49 Mont. 60.....34, 115
(Findings—Conclusiveness.)
(New Trial).....115, 450
Gordon v. Trevarthen, 13 Mont. 387..... 21
(Quotient Verdicts.)
Grant v. Williams, 54 Mont. 426..... 229
(Official Duty—Presumptions.)
Great Northern Ry. Co. v. Benjamin, 51 Mont. 167..... 21
(Quotient Verdicts.)
Grinrod v. Anglo-Am. Bond Co., 34 Mont. 169..... 86
(Fraud.)
Grorud v. Lossl, 48 Mont. 274.....128, 130
(Malicious Prosecution—Malice.)

Haddox v. Northern Pac. Ry. Co., 43 Mont. 8..... 66
(Evidence—Duty of Jury.)
Hamilton v. Hamilton, 51 Mont. 509..... 30
(Complaint—Sufficiency.)
Hanson Sheep Co. v. Farmers' etc. Bank, 53 Mont. 324..... 143
(Stock of Corporation Owned by One Person—Effect.)
Hardesty v. Largey Lumber Co., 34 Mont. 151..... 109
(Personal Injuries—Evidence—Sufficiency.)
Harrington v. Butte etc. Ry. Co., 36 Mont. 478..... 21
(Quotient Verdicts.)
(Verdict—Attack by Affidavit)..... 155
Harrington v. Stromberg-Mullins Co., 29 Mont. 157.....349, 350
(Conversion—Complaint.)
Harvey v. Town of Townsend, 57 Mont. 407..... 4
(Cities and Towns—Special Improvements.)
Hefferlin v. Karlman, 29 Mont. 139..... 91
(Pleading.)
Heilman v. Loughrin, 57 Mont. 380..... 34
(Conflict in Evidence—Verdict—Conclusiveness.)
Hendrickson v. Wallace, 29 Mont. 504..... 171
(New Trial—Review.)
Hersey v. Neilson, 47 Mont. 132..... 614
(Counties.)
Herzig v. Sandberg, 54 Mont. 538.....201
(Personal Injuries—Intoxication—Evidence.)
Hickey v. Parro S. & C. Co., 25 Mont. 164..... 306
(Receivership.)
Hinzeman v. City of Deer Lodge, 58 Mont. 369..... 590
(Special Improvements.)
Hollenback v. Stone & Webster Eng. Corp., 46 Mont. 559..... 31
(Personal Injuries—Damages.)
Huffine v. Lincoln, 52 Mont. 585..... 55
(Resulting Trusts.)
Hunter v. Montana C. Ry. Co., 22 Mont. 525..... 509
(Railroad Crossings—Duty of Traveler.)

In re Burke, 55 Mont. 303..... 603
(Attorneys—Disbarment.)
In re Higgins' Estate, 15 Mont. 474..... 297
(Executors and Administrators.)
In re Murphy's Estate, 57 Mont. 286..... 55
(Supreme Court—Rehearing—Grounds.)
In re Searles, 46 Mont. 322..... 453
(Appeal—Lies When.)
In re Tuohy's Estate, 33 Mont. 230..... 297
(Executors and Administrators.)

Jenkins v. Northern Pac. Ry. Co., 44 Mont. 295..... 23
(Personal Injuries—Pleading and Proof.)
J. I. Case Threshing Machine Co. v. Stewart, 60 Mont. 380..... 389
(Cited.)
Johnson v. City of Hardin, 55 Mont. 574..... 590
(Special Improvements in Cities and Towns.)
Jones v. Shannon, 55 Mont. 225.....115, 163, 171
(New Trial Order—Review.)

Kallio v. Northwestern Inspt. Co., 47 Mont. 314..... 15
(Parties *in Pari Delicto*.)
Kaufman v. Cooper, 38 Mont. 16..... 55
(Supreme Court—Rehearing—Grounds.)
Kavanaugh v. Flavin, 35 Mont. 133..... 253
(Laches.)
Kelley v. J. R. Daily Co., 56 Mont. 63..... 31
(Personal Injuries—Measure of Damages.)
Kenck v. Parchen, 22 Mont. 519..... 298
(Claims Against Estates.)
Kerr v. Blaine, 49 Mont. 602..... 229
(Obedience to Law—Presumptions.)
Kleinschmidt v. Binzel, 14 Mont. 131..... 300
(*Res Adjudicata.*)
Krueger v. Spieth, 8 Mont. 482..... 49
(Partnership.)

Lamme v. Dodson, 4 Mont. 560..... 551
(Adverse Possession.)
Landsman v. Thompson, 9 Mont. 182..... 68
(Witness—Improbability of Testimony.)
Lish v. Martin, 55 Mont. 582..... 155
(Verdicts—Attack by Affidavit.)
Lloyd v. Board, 15 Mont. 433..... 616
(Sheriffs—Custodians of Jails.)

McAllister v. McDonald, 40 Mont. 375..... 68
(New Trial—Power of Supreme Court.)
McDonnell v. Huffine, 44 Mont. 411.....512, 514
(Ditches—Easements—Quieting Title.)
McEnaney v. City of Butte, 43 Mont. 526..... 458
(Personal Injuries—Complaint.)
McGowan v. Nelson, 36 Mont. 67.....108 *et seq.*
(Personal Injuries—Insufficiency of Evidence.)
McIntyre v. Northern Pac. Ry. Co., 56 Mont. 43..... 68
(Witnesses—Improbability of Testimony.)
(New Trial—When Proper.)..... 163

McKay v. McDougall, 25 Mont. 258..... 104
(Mining Claims—Representation Work.)
Mansur v. City of Polson, 45 Mont. 596.....589 *et seq.*
(Cities and Towns—Special Improvements.)
Marron v. Great Northern Ry. Co., 46 Mont. 593..... 360
(Evidence—Refreshing Memory from Notes.)
Martin v. Corscadden, 34 Mont. 308..... 127
(Malicious Prosecution—Probable Cause.)
Masterson v. Hubbert, 54 Mont. 613..... 307
(Receivership.)
Mattock v. Goughnour, 11 Mont. 265..... 68
(Witnesses—Improbability of Testimony.)
Melville v. Butte etc. C. Co., 47 Mont. 1..... 15
(Parties *in Pari Delicto.*)
(Negligence—Right of Action—Personal Representatives).. 183
Merchants' Nat. Bank v. Greenhood, 16 Mont. 40..... 55
(Supreme Court—Rehearing—Grounds.)
Montana Ranches Co. v. Dolan, 53 Mont. 397..... 306
(Receivership.)
Moore v. Butte Electric Ry. Co., 47 Mont. 214..... 171
(New Trial.)
Moore v. Murray, 30 Mont. 13..... 6
(Pleading.)
Morrison v. Linn, 50 Mont. 396..... 551
(Adverse Possession—Payment of Taxes.)
Moss v. Goodhart, 47 Mont. 257..... 489
(Theory of Case.)
Mullen v. City of Butte, 37 Mont. 183..... 67
(New Trial—Insufficiency of Evidence.)
(New Trial—Review)..... 171
Murphy v. Cooper, 41 Mont. 72..... 35
(Conflict in Evidence—Findings Conclusive.)

Neary v. Northern Pac. Ry. Co., 41 Mont. 480..... 15
(Violation of Penal Statute—Negligence *Per Se.*)
(Personal Injuries—Measure of Damages)..... 31
Northern Pac. R. R. Co. v. Carland, 5 Mont. 146..... 513
(Easements.)

O'Brien v. Quinn, 35 Mont. 441..... 175
(Contracts—Breach—Nominal Damages.)
(General and Special Damages).....244, 270
O'Donnell v. City of Butte, 44 Mont. 97..... 503
(Pleading—Inconsistent Defenses.)
Orr v. Haskell, 2 Mont. 225..... 115
(New Trial.)
Osterholm v. Boston etc. Co., 40 Mont. 508..... 15
(Violation of Penal Statute—Negligence *Per Se.*)
Ott v. Pace, 43 Mont. 82..... 608
(Rescission.)

Parchen v. Chessman, 49 Mont. 326..... 253
(Laches.)
Poor v. Madison River P. Co., 41 Mont. 236..... 269
(Instructions—Settlement—Review.)
Pope v. Alexander, 36 Mont. 82..... 115
(Equity—Findings—Evidence—Sufficiency.)

Previsich v. Butte Electric Ry. Co., 47 Mont. 170..... 34
(Equity—Conflict in Evidence—Findings Conclusive.)
Price v. Stipek, 39 Mont. 426..... 93
(Vague Contracts Void.)
Pritchett v. Jenkins, 52 Mont. 81..... 241
(Damages—Market Price.)
Prudential Security Co. v. Three Forks Ry. Co., 49 Mont. 567..... 306
(Receivership.)
Pure Oil Co. v. Chicago etc. Ry. Co., 56 Mont. 266..... 464
(Negligence—Proximate Cause.)

Riley v. Blacker, 51 Mont. 364..... 253
(Laches.)
Roberts v. Oechsli, 54 Mont. 163..... 34
(Conflict in Evidence—Verdict Conclusive.)
(New Trial—Newly Discovered Evidence)..... 316
Robitaille v. Boulet, 53 Mont. 66..... 34
(Conflict in Evidence—Verdict Conclusive.)
(Equity—Findings—Evidence—Sufficiency) 115
Robinson v. Cole, 46 Mont. 140..... 171
(New Trial—Review.)
Root v. Butte etc. Ry. Co., 20 Mont. 354..... 176
(Special Damages.)
(General and Special Damages)..... 244
Rude v. Marshall, 54 Mont. 27..... 551
(Adverse Possession.)

Sanborn v. Powers, 58 Mont. 214..... 269
(Instructions—Review.)
Schumacher v. Hospital, 58 Mont. 457..... 570
(Expert Witnesses—Reading from Text-book.)
Schwab v. McVey, 54 Mont. 422..... 93
(Vague Contracts Void.)
Shapard v. City of Missoula, 49 Mont. 269..... 4
(Special Improvements.)
Sherris v. Northern Pac. Ry. Co., 55 Mont. 195..... 202
(Personal Injuries—Duty of Person to Avoid Danger.)
Silver v. Eakins, 55 Mont. 210..... 50
(Partnership.)
Smith v. Denniff, 24 Mont. 20.....512 *et seq.*
(Ditches—Easements.)
Smith v. Hoffman, 56 Mont. 299..... 34
(Conflict in Evidence—Verdict Conclusive.)
Smith v. Shook, 30 Mont. 30.....315, 316
(New Trial—Newly Discovered Evidence.)
Smith v. Smith, 45 Mont. 535.....288 *et seq.*
(Cited.)
Sprague v. Northern Pac. Ry. Co., 40 Mont. 481..... 509
(Railroad Crossings.)
State (ex rel. City of Billings) v. Billings Gas Co., 55 Mont. 102.. 237
(Public Service Commission.)
State (ex rel. Board) v. District Court, 53 Mont. 229..... 234
(Railroad Commission.)
State (ex rel. Beach) v. District Court, 29 Mont. 265..... 171
(New Trial—Diligence.)
State (ex rel. Gen. Elec. Co.) v. Alderson, 49 Mont. 29.....383, 387
(Articles of Incorporation—Filing Fees.)

State (ex rel. Rankin) v. Board of Examiners, 59 Mont. 557..... 47
(Statutes—Adoption from Other States.)
State (ex rel. Reynolds) v. Laurendeau, 27 Mont. 522..... 516
(*Certiorari.*)
State (ex rel. Samlin) v. District Court, 59 Mont. 600..... 179
(Intoxicating Liquors—Search-warrants.)
State v. Beesskove, 34 Mont. 41..... 155
(Verdict—Attack by Affidavit.)
State v. Belland, 59 Mont. 540..... 450
(New Trial—Newly Discovered Evidence.)
State v. Berberick, 38 Mont. 423..... 307
(Witnesses—Incompetents.)
State v. Brodock, 53 Mont. 463..... 597
(Cited.)
State v. Brooks, 57 Mont. 480..... 438
(Appeal—Harmless Error.)
State v. Brower, 55 Mont. 349..... 73
(Criminal Law—Evidence—Suspicions Insufficient.)
State v. Byrne, 60 Mont. 317..... 330
(Cited.)
State v. Colbert, 58 Mont. 584..... 438
(Insanity—Evidence Admissible.)
(Homicide—Mitigation—Burden of Proof).....440, 575
State v. Connors, 27 Mont. 227..... 317
(Appeal—Technicalities—Harmless Error.)
State v. Cook, 42 Mont. 329.....128, 374
(Instructions—Objections and Exceptions.)
State v. Crean, 43 Mont. 47..... 374
(Instructions—Absence of Objections.)
State v. Davis, 60 Mont. 426..... 569
(Change of Venue—Local Prejudice.)
State v. Fisher, 54 Mont. 211..... 326
(Evidence—Conjectures Insufficient.)
State v. Fowler, 59 Mont. 346.....330, 374
(Instructions—Absence of Objections.)
State v. Gaimos, 53 Mont. 118..... 601
(Rape—Evidence.)
State v. Gibbs, 10 Mont. 312..... 477
(Criminal Law—Trial—Continuance.)
State v. Griffith, 56 Mont. 241..... 420
(Sedition.)
State v. Groom, 49 Mont. 354..... 229
(Official Duty—Presumptions.)
State v. Guie, 56 Mont. 485..... 402
(Confessions—Admissions.)
State v. Hall, 55 Mont. 182..... 313
(Appeal—Prejudice not Presumed.)
(Criminal Law—Verdict—Presence of Defendant—Minutes.)
State v. Hill, 46 Mont. 24..... 330
(Instructions—Absence of Objections.)
State v. Hopkins, 54 Mont. 52..... 229
(Obedience to Law—Presumptions.)
State v. Howard, 30 Mont. 518..... 328
(Jurors—Competency.)
(Trial—Continuance) 478
State v. Jones, 48 Mont. 505..... 315
(Appeal—Evidence—Exceptions.)